(1)

No. 84-476-CFX
Status: GRANTED

Title: Robert McDonald, Petitioner
v.
David I. Smith

Docketed:
September 25, 1984

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Ennis Jr., Bruce J.

Counsel for respondent: Wood, B. F., Eagles, William A.

Entry	Date	Note	Proceedings and Orders
1	Sep 25 1984	G	Petition for writ of certiorari filed.
3	Oct 19 1984		Order extending time to file response to petition until November 28, 1984.
4	Nov 6 1984		Brief of respondent David I. Smith in opposition filed.
5	Nov 7 1984		DISTRIBUTED. November 21, 1984
6	Nov 26 1984		Petition GRANTED.
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7	Dec 27 1984		Joint appendix filed.
9	Jan 3 1985		Order extending time to file brief of petitioner on the merits until January 24, 1985.
11	Jan 3 1985		Order extending time to file brief of respondent on the merits until February 25, 1985.
12	Jan 15 1985		Record filed.
13	Jan 15 1985		Record filed.
14	Jan 24 1985		Brief of petitioner Robert McDonald filed.
15	Jan 24 1985		Brief amicus curiae of American Civil Liberties Union filed.
16	Feb 5 1985		SET FOR ARGUMENT. Wednesday, March 20, 1985. (3rd case).
17	Feb 25 1985		Brief of respondent David I. Smith filed.
18	Feb 28 1985		CIRCULATED.
19	Mar 20 1985		ARGUED.

84-476 (1)

No. 84-——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT MCDONALD,

Petitioner,

v.

DAVID I. SMITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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(2197)

QUESTIONS PRESENTED

1. Does the Petition Clause of the First Amendment provide an absolute defense to an action for libel, even if the plaintiff alleges knowing falsity, when:

a) the allegedly defamatory statements are contained in private letters from an individual citizen addressed solely to the President with copies to a few other federal officials; and

b) the statements concern the qualifications of a candidate voluntarily seeking presidential nomination and appointment to a high federal office?

2. In those circumstances, if the Petition Clause does not provide an absolute defense, does it at least require increased procedural protections, including judicial discretion to award costs and legal fees to an uninsured defendant if he ultimately prevails?

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IN THE

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OCTOBER TERM, 1984

No. 84-

ROBERT MCDONALD,

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v.

DAVID I. SMITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Robert McDonald respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 28, 1984.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. A at 1a-6a) is reported at 737 F.2d 427 (4th Cir. 1984). The opinion of the District Court for the Middle District of North Carolina (App. B at 7a-30a), is reported at 562 F. Supp. 829 (M.D.N.C. 1983).

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[1] The caption contains the names of all parties.

JURISDICTION

The judgment of the Fourth Circuit was entered on June 28, 1984 (App. C at 31a). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This is an action by respondent David I. Smith, a disappointed candidate for federal office, who seeks a million dollars in damages because of allegedly libelous statements concerning his qualifications for that office. The statements were contained in two private letters from the petitioner, Robert McDonald, to President Reagan, with copies to only a few federal officials in the executive and legislative branches.[2]

The complaint alleges that respondent was actively seeking nomination and appointment as U.S. Attorney for the Middle District of North Carolina, and was a

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[2] Respondent does not allege that the statements were communicated to the public or the press. The complaint alleges that defendant sent these letters to "some of the highest governmental and political figures in the United States." There is no allegation that the letters were mailed to anyone other than the individuals specifically listed as receiving copies. The first letter, dated December 1, 1980, was addressed to President-elect Reagan and showed copies to Edwin Meese; Rep. Jack Kemp; Rep. W.E. Johnson; and Sen. Jesse Helms. The second letter, dated February 13, 1981, was addressed to President Reagan, and showed copies to Edwin Meese; Rep. Barry Goldwater, Jr.; Sen. Jesse Helms; and William Webster, Director of the Federal Bureau of Investigation.

serious contender before petitioner mailed the allegedly defamatory letters.

The complaint alleges that both letters contained defamatory statements which injured respondent's reputation and damaged his chances of appointment.[3] The complaint further alleges, although only in conclusory terms, that petitioner knew the statements were false at the time he made them and that he acted out of malice and spite towards respondent.[4]

The complaint was filed in state court in Alamance County, North Carolina. Petitioner removed the case to the United States District Court for the Middle District of North Carolina on grounds of diversity of citizenship, because he was a citizen of Virginia and respondent was a citizen of North Carolina.

Petitioner thereafter moved for judgment on the pleadings, on the ground that the allegedly defamatory statements were absolutely privileged by the Petition Clause of the First Amendment to the United States Constitution. Petitioner also argued that even if private communications from a citizen to his government are not absolutely privileged, defendants who are sued because of such communications should be entitled to special pro-

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[3] The letters stated petitioner's opinion that respondent lacked the character and technical competence to merit appointment. They discussed specific incidents in which respondent acted with "tremendous lack of regard . . . for the law, the civil rights of individuals, and our system of justice in general."

[4] Petitioner's answer to the complaint denied that the statements were false or that petitioner knew they were false. Indeed, the letters themselves provided a means for verifying the truth of most of the statements contained therein by documenting the instances described with names, addresses, and telephone numbers of persons present at the time, with citations to court records and newspaper articles, and with other evidence. Petitioner offered to appear at any hearing related to the selection process in order to testify under oath about respondent's character and qualifications.

cedural protections, including judicial discretion to award them costs and legal defense fees should they ultimately prevail.

On April 28, 1983, the District Court ruled against petitioner and filed a written opinion. 562 F. Supp. 829; App. 7a. The District Court agreed with petitioner that the First Amendment right to petition is applicable to the states and imposes limits on the state's power to vindicate reputation through its law of defamation, and also agreed that

> "decisions interpreting the 'speech' clause of the first amendment do not necessarily control cases concerning the 'petition' clause. For, as Chief Justice Marshall once stated, 'It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.'"

562 F. Supp. at 837; App. 17a.

The District Court nevertheless rejected petitioner's contention that the principles developed by this Court in the *Noerr-Pennington* line of cases[5] immunize legitimate petitioning activity from liability for defamation. The District Court interpreted those cases as holding only that Congress did not intend to regulate petitioning activity through the Sherman Act, and not as articulating any broader or more general rule of constitutional law. 562 F. Supp. at 838; App. 20a.

The District Court agreed with petitioner that his allegedly defamatory communications fell "within the general protection afforded by the petition clause" (562 F. Supp. at 838; App. 21a), but concluded that the Petition Clause does not provide an absolute privilege in libel

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[5] *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 126 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

cases. Instead, relying on this Court's 1845 decision in *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), the District Court held that the privilege accorded under the Petition Clause is a qualified privilege only. 562 F. Supp. at 840; App. 23a.

The District Court acknowledged that its decision was contrary to that of the West Virginia Supreme Court in *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981), but concluded that "the majority in *Webb v. Fury* has extended the scope of the *Noerr-Pennington* rationale far beyond its proper boundaries." 562 F. Supp. at 842; App. 28a.

Petitioner appealed to the Fourth Circuit, which affirmed. The Fourth Circuit, like the District Court, thought petitioner's claim to an absolute privilege was "governed" and barred by this Court's 1845 decision in *White v. Nicholls* (737 F.2d at 428; App. 3a), and thought that the absolute privilege recognized subsequently by this Court in the *Noerr-Pennington* trilogy provided a defense only in antitrust actions. 737 F.2d at 429; App. 5a-6a.

Neither the District Court nor the Fourth Circuit addressed petitioner's position that libel defendants who are sued because of *bona fide* petitioning activity should at least be entitled to increased procedural protections, including an opportunity to recover from the plaintiff the costs of their defense, should they ultimately prevail.

Although ruling against petitioner, the Fourth Circuit acknowledged that "the nature of the privilege that protects conduct arising under the petition clause presents a serious and unsettled question," and acknowledged a conflict between its decision and decisions of two state supreme courts and the Eighth Circuit. 737 F.2d at 428; App. 3a.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION IS IN DIRECT, ACKNOWLEDGED, AND UNSEEMLY CONFLICT WITH DECISIONS OF THE HIGHEST COURTS OF TWO STATES WITHIN THAT CIRCUIT AS TO WHETHER THE PETITION CLAUSE OF THE FIRST AMENDMENT PROVIDES AN ABSOLUTE OR ONLY A CONDITIONAL DEFENSE WHEN INDIVIDUAL CITIZENS ARE SUED FOR LIBEL BECAUSE OF THE INFORMATION THEY COMMUNICATE TO GOVERNMENTAL OFFICIALS.

A. The Conflict Is Direct And Acknowledged.

In rejecting petitioner's claim that his allegedly defamatory letters to the President were absolutely privileged under the Petition Clause, the Fourth Circuit acknowledged that "other courts have concluded that a petitioner is entitled to absolute privilege," citing the Maryland case of *Sherrard v. Hull*,[6] and the West Virginia case of *Webb v. Fury*.[7] 737 F.2d at 428 n.3; App. 3a n.3. See also 737 F.2d at 429; App. 5a.

The conflict between the Fourth Circuit and the highest courts in Maryland and West Virginia is direct and irreconcilable. All three cases were defamation actions based on communications from citizens to governmental officials. In each case the question presented was whether the defendants were entitled to an absolute privilege under the Petition Clause, or only to the conditional privi-

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[6] 460 A.2d 601 (Md. 1983), *affirming* 53 Md. App. 553, 456 A.2d 59 (1983). For some reason, the Fourth Circuit cited only to the lower court decision in *Sherrard*, even though it was aware that the Maryland Court of Appeals had unanimously affirmed the lower court decision and had adopted "the well-reasoned opinion" of the lower court. See 460 A.2d at 601.

[7] 282 S.E.2d 28 (W. Va. 1981).

lege it has been assumed they would have in any event under the Free Speech Clause.[8]

In order to avoid any chill on candid communications from citizens to their government, the courts in *Sherrard v. Hull* and *Webb v. Fury* recognized an absolute privilege for all communications that legitimately fall within the protection of the Petition Clause.

As the court observed in *Sherrard v. Hull*, 456 A.2d at 70-71:

> "The right of petition is a necessary element of our representative government, for it enables persons to inform the government of actual or perceived wrongs. It is to be distinguished from First Amendment freedoms, such as free speech, in defamation settings which generally involve communications made by one individual to another and are not directed at obtaining governmental action. It is the role of the government in this scenario which persuades us to hold the privilege to be absolute, indefeasible by malice."[9]

In *Webb v. Fury*, the court ruled that the "communications made by petitioner Webb to the federal agencies

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[8] This Court held in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), that the conditional privilege provided by the Free Speech Clause does not apply if the communication was malicious in the constitutional sense, *i.e.*, knowingly false or uttered in reckless disregard of its truth. The District Court and Fourth Circuit decisions rest on the assumption that a public figure plaintiff will have to show constitutional malice in order to prevail even if, as here, the defendant is a non-media defendant. That question is presently before the Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, No. 83-18 (see 52 U.S. Law Week 3011, 3148, 3369 and 3700).

[9] In Maryland, the absolute privilege recognized in *Sherrard* for petitions to legislative bodies has been held to be equally applicable to petitions to executive agencies. *Bass v. Rohr*, 471 A.2d 752, 757-758 (Md. Ct. Spec. App. 1984).

appear to be classic examples of absolutely privileged petitioning activity. . . . The people's right to petition the government for a redress of grievances is a clear constitutional right and the exercise of that right does not give rise to cause of action for damages." 282 S.E.2d at 37-39. The court concluded that unlike the conditional privilege provided by the Free Speech Clause, "the right to petition protects activity alleged to be malicious or knowingly false," because "permitting proof of malicious, fraudulent or deceitful intention to overcome the right to petition would so discourage the exercise of the right as to constitute an impermissible burden." 282 S.E.2d at 40.

The Fourth Circuit knew its decision could not be reconciled with *Sherrard v. Hull* or *Webb v. Fury*, and it made no effort to do so, noting only that it was "not persuaded by these authorities." 737 F.2d at 429; App. 5a. There is thus a direct and acknowledged conflict between the Fourth Circuit and the highest courts of Maryland and West Virginia as to whether the Petition Clause provides an absolute privilege in libel actions. This conflict is not between a recent case and an ancient case that would probably be decided differently in the light of intervening doctrinal developments. The cases were decided in 1984, 1983 and 1981, respectively, and are not likely to be reconsidered.

Accordingly, unless this Court resolves the conflict, the Petition Clause will provide an absolute defense in libel actions in Maryland and West Virginia state courts, but only a conditional privilege in the federal courts in those states.

B. The Direct Conflict Between The Fourth Circuit And The Highest Courts Of Maryland And West Virginia, Both Of Which Are Located Within The Fourth Circuit, Presents Additional Considerations Of Federalism Which Warrant Review In Order To Avoid Otherwise Inevitable And Unseemly Clashes Between State And Federal Courts.

This case presents the most intolerable type of conflict. Every direct conflict over the meaning of the federal constitution merits the attention of this Court, because the constitution should not mean different things in different jurisdictions. But when the conflict is between a federal circuit court and the highest courts of two states within that circuit, additional considerations of federalism and respect for state sovereignty compel review.

A federal district court forced to resolve that conflict would probably adopt the reasoning of the Fourth Circuit, whose judgments it is ordinarily bound to follow. But state courts are equally required, and entitled, to interpret and apply the federal constitution; a district court's deference to the Fourth Circuit's opinion would therefore be based solely on the premise that federal courts have greater wisdom, or at least authority, in interpreting the federal constitution than do state courts.

This conflict will encourage forum shopping that will add increasing burdens to the federal courts in Maryland and West Virginia, and will produce outcomes in federal diversity cases in those states that will be substantively different from the outcomes that would have resulted in the state courts. Given the existing conflict, libel plaintiffs in Maryland and West Virginia will certainly sue in federal court, rather than in their state courts, if they can allege diversity.

Denial of review in these circumstances would necessarily result in unseemly clashes between federal and state courts. Unless this Court resolves the conflict, a federal diversity court sitting in Maryland or West Vir-

ginia will necessarily have to reject the recent and considered judgment either of the highest court of the state in which it sits, or of the Fourth Circuit, in deciding whether the Petition Clause provides an absolute privilege or only a conditional privilege to libel defendants.

II. THE FOURTH CIRCUIT'S DECISION CREATES A CONFLICT BETWEEN DECISIONS OF THE EIGHTH AND SEVENTH CIRCUITS, ON THE ONE HAND, AND THE SIXTH AND FOURTH CIRCUITS, ON THE OTHER, AS TO WHETHER THE PETITION CLAUSE PROVIDES AN ABSOLUTE PRIVILEGE ONLY IN ANTITRUST ACTIONS, OR ALSO IN OTHER ACTIONS BASED ON THE CONTENT OF COMMUNICATIONS FROM CITIZENS TO GOVERNMENTAL OFFICIALS.

In the *Noerr-Pennington* triology of cases,[10] this Court made it clear that the Petition Clause provides not just a conditional defense but an absolute defense in antitrust actions based on *bona fide* petitioning activity.[11]

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[10] See note 5, *supra*.

[11] In *California Motor Transport*, this Court preserved an exception for "sham" petitions that bar the plaintiffs "from meaningful *access* to adjudicatory tribunals and so to usurp that decision making process." 404 U.S. at 512 (emphasis added). See also *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 103 S. Ct. 2161, 2168 (1983), suggesting that the sham exception could apply to baseless litigation that is "intended to restrain, or that has the likely effect of restraining, employees" from exercising their right to petition the National Labor Relations Board. Access-barring has been recognized as the "cornerstone to the sham exception." *Wilmorite, Inc. v. Eagan Real Estate, Inc.*, 454 F. Supp. 1124, 1134-35 (N.D.N.Y. 1977), *cert. denied*, 439 U.S. 983 (1978). See also *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1082 (9th Cir. 1976) ("[I]n order to state a claim for relief under the *Trucking Unlimited* exception, a complaint must include allegations of the specific activities, not protected by *Noerr*, which plaintiffs

Recognizing that the existence of an absolute defense under the Petition Clause depends on the nature of the petitioning activity, not on the nature of the cause of action in which the defense is asserted, the Eighth and Seventh Circuits have held that the constitutional basis for the *Noerr-Pennington* doctrine is not limited to antitrust actions, but provides an absolute defense to other actions based on *bona fide* petitioning activity.

In *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980), the Eighth Circuit affirmed dismissal of a civil rights action, ruling that "the private citizens and their lawyers were absolutely privileged by the First Amendment to petition for the zoning amendment that caused plaintiffs' damages." 626 F.2d at 614. The Eighth Circuit said its "holding follows from principles recognized in" *Noerr-Pennington*, and noted that "lower federal courts have adopted this deference to the right to petition not only in antitrust cases but in other cases involving civil liability. In various contexts, these courts have held individual defendants constitutionally immune from liability for exercising their right to petition." 626 F.2d at 614-15.[12]

The Fourth Circuit acknowledged that its decision was in conflict with *Gorman Towers*. 737 F.2d at 428; n.3; App. 3a n.3.

In *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978), the Seventh Circuit ruled that the Petition Clause provides

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contend have *barred their access* to a governmental body.") (emphasis added), *cert. denied*, 430 U.S. 940 (1977).

The complaint in this case does not allege that petitioner's letters were a sham, and does not allege that those letters barred respondent from access to governmental officials.

[12] See also *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980) (NOW's boycott of Missouri absolutely privileged under Petition Clause).

an absolute defense to a defendant sued under 42 U.S.C. § 1985(1) for sending complaints to an IRS agent's supervisor "with knowledge of their falsity." 547 F.2d at 1345. Acknowledging that *Noerr* was "not on all fours," the Seventh Circuit nevertheless cited *Noerr* as "a useful analogy" and ruled that a conditional defense was insufficient because "the prospect of a federal lawsuit resulting from any citizen complaint about the conduct of federal officials could chill the exercise of the right to petition." 547 F.2d at 1344, 1343. The Seventh Circuit noted that "it is easy enough to allege knowing falsity in a complaint . . .," thereby subjecting defendants to the likelihood of "full-blown litigation in which they must persuade a jury that their complaints, if not true, were at least based on enough facts as to avoid an inference of knowing or reckless falsity. This spectre alone could lead a citizen or taxpayer contemplating the lodging of a good faith complaint to reconsider." 547 F.2d at 1345.

In this case, the District Court and the Fourth Circuit adopted an extremely narrow interpretation of the applicability of the Petition Clause and the *Noerr-Pennington* doctrine, and effectively limited the absolute defense they provide to antitrust actions.[13]

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[13] The District Court, for example, expressly noted and rejected petitioner's argument "that *Noerr-Pennington* insulates any type of conduct that can be characterized as petitioning activity not only from the Sherman Act, but all other types of civil liability. . . . [T]he court determines that the defendant has misread the scope of the *Noerr-Pennington* rulings. In both cases, the Supreme Court was called upon to construe the congressional intent behind the Sherman Act in light of a possible conflict with the constitutionally protected right to petition the government. As this court interprets those rulings, it finds that the Supreme Court ruled only that Congress did not intend to regulate through the Sherman Act combinations to influence government decisionmakers by publicity campaigns, lobbying, or the use of the channels and procedures of state and federal agencies, even where the intentions and purposes of those involved in the combinations are anti-competitive and monopolistic. . . . [T]he court rejects McDonald's interpretation of the

The Fourth Circuit also cited and relied upon *Windsor v. The Tennessean*, 719 F.2d 155 (6th Cir. 1984). *Windsor*, in turn, expressly declined to follow *Stern v. United States Gypsum*, and held, contrary to the holding in *Stern*, "that the first amendment right to petition for redress of grievances does not protect from section 1985(1) liability those who conspire intentionally to defame a federal officer in order to effect that official's discharge. To the extent that *Stern* holds to the contrary, we decline to follow it."

Thus, there is a conflict between the Fourth and Sixth Circuits, on the one hand, and the Eighth and Seventh Circuits, on the other, as to whether the Petition Clause provides an absolute defense in actions other than antitrust actions.[14]

Noerr-Pennington decisions. . . ." 562 F. Supp. at 838 (footnotes omitted); App. 19a-21a.

The Fourth Circuit adopted an equally narrow interpretation of the Petition Clause and the *Noerr-Pennington* doctrine. See 737 F.2d at 429-30; App. 5a-6a.

[14] Numerous other state and federal courts have ruled that the Petition Clause establishes an absolute right to petition when the communications are between citizens and government. *E.g., Sierra Club v. Butz*, 349 F. Supp. 934, 936 (N.D. Cal. 1972) (Petition Clause provides absolute defense against common law tort liability for intentional interference with advantageous relationship and for fraudulent misrepresentation; complaints based on environmental group's administrative appeals and written and oral complaints to federal officials dismissed); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803 (S.D.N.Y. 1979) (lobbying town officials and filing complaints absolutely privileged; complaints based on 42 U.S.C. §§ 1982, 1983 and 1985(3) dismissed); *City of Long Beach v. Bozek*, 31 Cal.3d 527, 183 Cal. Rptr. 86, 645 P.2d 137 (1982) (filing suit against government is absolutely privileged under Petition Clause, so governmental entities cannot sue for malicious prosecution).

III. THE FOURTH CIRCUIT ACKNOWLEDGED THAT THE NATURE OF THE PRIVILEGE PROVIDED BY THE PETITION CLAUSE PRESENTS A SERIOUS AND UNSETTLED QUESTION.

Although declining to grant petitioner an absolute defense or increased procedural protections, the Fourth Circuit nevertheless acknowledged that "the nature of the privilege that protects conduct arising under the petition clause presents a serious and unsettled question. . . ." 737 F.2d at 428; App. 3a.

A. Whether The Petition Clause Provides An Absolute Defense In Libel Actions Is A Question Of Nationwide And Recurring Importance, And Is Of Concern Not Only To Individual Libel Defendants, But Also To Congress And The Executive Branch.

Whether citizens can communicate candidly with federal officials concerning the qualifications of persons seeking federal office, without fear that they will have to defend a costly libel action if they do, is obviously a question of importance not only to individual citizens, but also to Congress and the Executive Branch.

In fact, the United States appeared as *amicus* in *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981), and expressly urged that court to recognize an absolute defense, based on the Petition Clause, for citizens who are sued for libel because of their communications to federal agencies. The United States argued that a conditional defense would be inadequate because "the threat of a defamation suit will effectively chill the exercise of the right to petition. Unless the right to petition is privileged against suits such as DLM's, it will lose any real meaning because private citizens will be deterred by the threat of litigation from exercising the right." [15]

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[15] Reply Brief for the United States as *Amicus Curiae* in *Webb v. Fury*, *supra*, at 13. See also *id.* at 11 ("To allow a plaintiff to simply plead bad faith would create a chilling effect on the exercise of the right to petition."); Brief for the United States as *Amicus Curiae* in *Webb v. Fury*, *supra*, at 31, 34 ("A final con-

The deterrent is not just the prospect of having to pay substantial damages if a jury finds the defendant's statements to be libelous, but also the prospect of having to defend at all. Over two-thirds of all libel defendants are private citizens and non-media defendants,[16] most of whom, like petitioner, do not have insurance to cover the costs of a judgment, or of a defense. Even if such defendants ultimately prevail, they have to absorb, personally, the entire cost of their defense. It is common for prevailing defendants in libel actions to spend many thousands of dollars on attorneys' fees (lawyers frequently represent libel plaintiffs, but not defendants, on a contingency fee basis), and on deposition transcripts and related costs. That is a great deal for an individual citizen to spend for the privilege of communicating with his government.[17]

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stitutional protection afforded Webb, in addition to those discussed above, is the First Amendment right to petition the Government for a redress of grievances . . . . Persons who provide information to the federal government under these statutes [the Clean Water Act and the Surface Mining Act] should not be required to risk the possibility of a lawsuit and liability. The realization of the goals of these statutes requires an absolute privilege."

More recently, the House Joint Leadership has submitted a brief *amici curiae* urging recognition of an absolute privilege for communications from citizens to Congress. See Memorandum of the House Joint Leadership as *Amici Curiae*, dated June 14, 1982, submitted in *Webster v. Sun Company, Inc.*, (D.D.C. No. 81-2867). See also the Supplemental Memorandum of the House Joint Leadership as *Amici Curiae*, dated July 6, 1984, submitted in the same case.

[16] Between January 1976 and June 1979, approximately 70% of the defendants in all reported defamation cases were non-media defendants. Franklin, Marc A., "Winners And Losers And Why: A Study of Defamation Litigation," 1980 Am. Bar Foundation Research Journal 455, 497.

[17] This Court has frequently noted the deterrent impact of potentially expensive litigation, particularly when individuals do not have insurance or free counsel, and when (as in most cases alleg-

Thus, even in the rare case where the citizen can be relatively *certain* that his statements will ultimately be found to be true, he also knows that if he is sued he will have to pay thousands of dollars to defend against the conclusory allegation—easily made—that they are knowingly false.

B. Whether The Petition Clause Requires Increased Procedural Protections In Libel Actions Based On Bona Fide Petitioning Activity Is A Question Of Nationwide And Recurring Importance, And The Fourth Circuit's Refusal To Grant Increased Procedural Protections Is Inconsistent With Principles Established In Prior Decisions Of This Court.

This Court has consistently and repeatedly ruled that special procedures are required in cases governed by the Free Speech Clause of the First Amendment. *E.g., Bose Corporation v. Consumers Union*, 104 S. Ct. 1949 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Kunz v. New York*, 340 U.S. 290 (1951).[18]

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ing malice), complex factual issues are likely to preclude summary judgment. *E.g., Briscoe v. LaHue*, 103 S. Ct. 1108, 1120, and n.29 (1983), *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 103 S. Ct. 2161, 2169 (1983).

[18] These increased procedural protections include *de novo* appellate review of facts in free speech cases, and permitting a defendant, in the free speech context, to attack a statute on its face for overbreadth, even though it may have been perfectly constitutional as applied to that defendant. Indeed, the requirement that public figure plaintiffs allege and prove malice in libel cases is a special procedure "designed to preserve the robust exchange of ideas and

The rights protected by the Petition Clause are even more central to our representative form of government than are the rights protected by the Free Speech Clause, and they should be accorded even greater procedural protections.

Historically, the right of petition is much older than, and quite distinct from, the right of speech. The right of petition can be traced at least to the 13th Century. The Magna Carta, or "Great Charter of Liberties," resulted from a petition feudal barons presented to King John in 1215;[19] and the right to petition almost certainly existed even before Magna Carta.[20] In contrast, the

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information which is essential to our way of life." *Webb v. Fury*, 282 S.E.2d at 47 (Neely, J., dissenting). In *Webb*, the dissent would have granted even greater procedural protections than requested here, and would have provided that a prevailing "defendant be awarded the full costs of his defense as a matter of course without exception." *Id.*

[19] See W. McKechnie, *Magna Carta* 38 (1914). See also O. Holt, *The Making of Magna Carta* (1965); A. Pallister, *Magna Carta—The Heritage of Liberty* (1971); *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 82, 92d Cong., 2d Sess. 1031 (1973); W. Stubbs, *The Constitutional History of England* 413 (J. Cornford ed. 1979) (tracing right to petition to the articles of the barons in 1215 and other precedents from 1258, 1301, 1309, and 1310).

The compromise achieved by the Magna Carta prevented a rebellion by the barons and the overthrow of King John. The right to petition in our Constitution plays a similar function by placing authorities on notice regarding the people's grievances so that those grievances can be corrected quickly and peacefully.

[20] One commentator states that "[t]he right of every subject to petition the sovereign *had always existed*." A. White, *The Making of the English Constitution* (2d ed. 1925) (emphasis added). According to another authority, "[t]he right of petitioning the crown and parliament was one of the most valuable possessed by the subject, and seems to have been exercised from the earliest times." F. Plucknett, *Taswell-Langmead's English Constitutional History* 669 (11th ed. 1960). The earliest recorded petition may have been in 1013, when London fell to the Danes and Aethelred

general right of speech did not develop until at least four hundred years later. See generally L. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* 88-125 (1960).

Although the rights of speech and petition are closely related, they are not identical. All petition is speech, but not all speech is petition. Petition is a narrow and preferred form of speech.

The distinctions between the rights of petition and speech reflect the differences in their underlying purposes. The right of speech furthers the autonomy of individuals by permitting them to express their own ideas; it ensures that government will be subject to public scrutiny and criticism; and it advances the quest for truth by subjecting competing voices to a free marketplace of ideas. See generally L. Tribe, *American Constitutional Law* § 12-1, at 577-79 (1978).

The right to petition, on the other hand, is specifically framed to ensure that channels of communication between citizens and their government remain unimpeded. The government, by receiving petitions, obtains necessary information regarding individual problems, broad political and social concerns, and potential or actual violations of law. Only if the channels for petitioning remain open will government be informed and remain responsive to the needs of its citizens. It was "the role of the govern-

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II (also known as "the Unready") fled to France. The English leaders, according to the *Anglo-Saxon Chronicle*, sent him a Remonstrance listing grievances and summoning Aethelred to appear before the witan. He sent his son Edward with a written message that he "would remedy each one of the things which they all abhorred, and everything should be forgiven that had been done or said against him, on condition that they all unanimously and without treachery return to their allegiance." This brief message, responding to a petition for redress of grievances, may be the first recorded document of liberty in English history. Marsh, *Documents of Liberty* 13-14 (1971).

ment" in the right of petition which distinguished that right from the right of speech for the court in *Sherrard v. Hull*, and which "persuade[d] [the court] to hold the privilege to be absolute, indefeasible by malice." 456 A.2d at 71.

The right to petition is thus of immense value to government, and is even more central than the right of free speech to our representative form of government. Indeed, the right to petition has been held to be one of the few privileges and immunities of national citizenship.[21] It is the means by which citizens make their needs and wishes known to government. It provides citizens a mechanism for obtaining redress of grievances, and for expressing deeply-held beliefs regarding public issues. If this extraordinarily fundamental interest of both citizen and government in maintaining open and uninhibited channels of communication does not require an absolute privilege for *bona fide* petitioning activity, as petitioner contends, it at least requires increased procedural protections to minimize the number of citizens who will be deterred by the threat of litigation from communicating with their elected representatives.

IV. BECAUSE THE FOURTH CIRCUIT ERRED IN CONCLUDING THAT THIS CASE IS GOVERNED BY THIS COURT'S 1845 DECISION IN *WHITE v. NICHOLLS*, THIS COURT SHOULD, AT THE LEAST, SUMMARILY REVERSE OR VACATE AND REMAND TO ENABLE THE FOURTH CIRCUIT TO RECONSIDER.

Curiously, although acknowledging that the nature of the privilege provided by the Petition Clause presents an "unsettled" question, the Fourth Circuit nevertheless concluded that this case is "governed" by *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845). 737 F.2d at 428; App. 3a.

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[21] See *In re Quarles*, 158 U.S. 532 (1895); *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1876).

White obviously does not "govern" this case. *White* was not a constitutional case at all. The defendants did not claim a constitutional privilege, whether absolute or conditional, and this Court did not purport to interpret or apply the Constitution. *White* was simply a common law case arising in the District of Columbia, and the Court did no more than analyze the common law existing at that time.[22]

White was decided well before the First Amendment, including the Petition Clause, was held to apply to state action at all. Furthermore, *White* was decided in an era in which the First Amendment was not thought to provide *any* privilege against defamation liability, whether conditional or absolute. Until this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), libelous speech was considered to be simply unprotected by the First Amendment. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952). Like "fighting words," obscenity, and commercial advertising, defamatory speech was considered to be wholly "outside the scope of the freedom of speech. . . ." See *Bose Corporation v. Consumers Union*, 104 S. Ct. 1949, 1961 (1984). That the *White* Court did not recognize or even discuss an absolute constitutional privilege for defamatory speech was entirely consistent with the jurisprudence of the time, which did not authorize even a conditional constitutional privilege. See *Sherrard v. Hull*, 456 A.2d at 68. For all these reasons, *White* clearly does not "govern" in the present era, now that defamatory speech *is* entitled to constitutional protecton.

If the Fourth Circuit had not believed it was "governed" by *White*, it might have reached a different con-

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[22] Indeed, in *Briscoe v. LaHue*, 103 S. Ct. 1108, 1114 n.12 (1983), a majority of this Court expressed the opinion that "*White v. Nicholls* was not even a reliable statement of the common law," and concluded that "*White v. Nicholls* cannot be considered authoritative."

clusion. Accordingly, because *White* clearly does not govern, and because the Fourth Circuit's belief that it does is inconsistent with *New York Times Co. v. Sullivan*, *Noerr-Pennington*, and with doctrinal developments in this Court over the past 139 years, the Court should at least reverse summarily on that ground or vacate and remand for further consideration.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should summarily reverse or vacate and remand for further consideration.

Respectfully submitted,

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Dated: September 25, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 83-1509

DAVID I. SMITH,

Appellee,

v.

ROBERT MCDONALD,

Appellant.

Argued Jan. 11, 1984

Decided June 28, 1984

Bruce J. Ennis, Washington, D.C. (Geoffrey P. Miller, Kit Kinports, Ennis, Friedman, Bersoff & Ewing, Washington, D.C., McNeill Smith, H. Miles Foy, III, Smith, Moore, Smith, Schell & Hunter, Greensboro, on brief), for appellant.

Henry Blinder, Durham, N.C. (B.F. Wood, Latham, Wood & Abernathy, Graham, N.C., on brief), for appellee.

Before RUSSELL and WIDENER, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

Robert McDonald, asserting absolute privilege as a defense to an action for libel, appeals from an order denying his motion for judgment on the pleadings. We affirm.

McDonald sent two letters to the President of the United States, with copies to several people in his administration and members of Congress, suggesting that David I. Smith, who was seeking appointment as United States Attorney in North Carolina, was not fit for the position. After the President declined to appoint him, Smith filed a libel action in state court alleging that McDonald's letters to the President contained "false, slanderous, libelous, inflammatory, and derogatory statements" and that McDonald had composed the letters maliciously and with evil intent.

McDonald removed the action to federal court on the basis of diverse citizenship. He then filed a motion for judgment on the ground that his letters were absolutely privileged under the petition clause of the first amendment and the appointments and speech or debate clauses of the United States Constitution. The district court denied the motion, ruling that McDonald was entitled only to the defense of qualified privilege.[1]

I

The first issue, which Smith has raised by a motion to dismiss, is whether the district court's order is appealable.

In *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); *Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979); and *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), interlocutory orders denying absolute immunity were appealable because they satisfied the criteria for collateral orders explained in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).[2] Tested by the principles explained in these

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[1] *Smith v. McDonald*, 562 F.Supp. 829 (M.D.N.C. 1983).

[2] *See also Chavez v. Singer*, 698 F.2d 420 (10th Cir. 1983); *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979); *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir. 1984) (dicta).

cases, the order denying McDonald's defense of absolute immunity is appealable. It is a final disposition of a claimed right which is independent from the subject matter of the libel action. It resolves an issue that cannot be effectively reviewed after final judgment. Deferral would defeat McDonald's claim that he should not be put to trial, which is the initial protection of absolute privilege. Finally, the nature of the privilege that protects conduct arising under the petition clause presents a serious and unsettled question because other courts have concluded that a petitioner is entitled to absolute privilege.[3]

II

The first amendment provides: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." The issue raised by the motion for judgment on the pleadings is whether the petition clause affords McDonald a complete defense even if, as alleged in the complaint, his letters to the President were false and malicious. Resolution of this issue depends on whether the petition clause creates an absolute privilege or a qualified privilege. The appointments and speech or debate clauses neither add to nor detract from McDonald's defense, and they are not germane to this issue.

In agreement with the district court, we conclude that this case is governed by *White v. Nicholls*, 44 U.S. (3 How.) 266, 11 L.Ed. 591 (1845). Nicholls and others wrote several letters to the President and to the Secretary of the Treasury protesting that White was unfit to serve as collector of customs. After White was replaced by one of his critics, he brought suit against his detractors, alleging that the letters to the President and the Secretary were false and maliciously composed. The

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[3] *See, e.g., Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Sherrard v. Hull*, 456 A.2d 59, 53 Md.App. 553 (1983); *Webb v. Fury*, 282 S.E.2d 28 (W.Va. 1981).

trial court, however, ruled that the letters were inadmissible, and the jury consequently returned a verdict against White.

In the Supreme Court, the authors sought to uphold the trial court's exclusion of their letters on the ground that they were privileged communications. They argued that the letters were sent to the President to obtain White's removal and that this was a "perfectly constitutional proceeding." 3 How. at 283.

The Supreme Court rejected the arguments advanced by the letter writers, reversed the judgment, and remanded the case for a new trial at which the letters should be admitted in evidence. Although the Court did not expressly advert to the first amendment, it recognized that the letters were privileged communications because they were petitions to an appropriate authority for redress of grievances. After canvassing English and American common law authorities, the Court held that the privilege arising from the right to petition was subject to "well-defined qualifications." 3 How. at 287. It went on to explain that the presumption of malice that ordinarily attends the publication of defamatory words must give way to the privilege. Consequently, to recover damages, the complainant must prove that the petitioner acted with express malice. 3 How. at 291. The Court disapproved of an English case that held a false petition was not actionable. 3 How. at 289.

The Court's reasoning in *White v. Nicholls* rests on common law and not on an explicit construction of the petition clause. This, however, does not render it inappropriate for our consideration. The right to petition secured by the first amendment was known to the common law. But the amendment does not define the privilege that protects the exercise of this right. To determine the nature of this privilege recourse to the common law is proper. *See Ex Parte Grossman*, 267 U.S. 87, 108-09, 45 S.Ct. 332, 333, 69 L.Ed. 527 (1925). Fur-

thermore, although *White v. Nicholls* dealt with an office holder, the Court said that the important issue under inquiry encompassed applicants for office. 3 How. at 285. The Court has declined to follow dicta in *White v. Nicholls* about the privilege accorded witnesses,[4] but the case has not been overruled.

Guided by principles the Court explained in *White v. Nicholls*, we conclude that the district court properly ruled that McDonald was not entitled to the defense of absolute privilege. *Accord Windsor v. The Tennessean*, 719 F.2d 155 (6th Cir. 1983). The result we reach is consistent with *Bradley v. Computer Sciences Corp.*, 643 F.2d 1029, 1033 (4th Cir. 1981), where we held that the petition clause affords a qualified privilege. In that case, however, we had no occasion to discuss whether the privilege was absolute. *See also Restatement (Second) of Torts* § 598 (1977).

McDonald cites a number of cases that support his claim of absolute privilege.[5] We are not persuaded by these authorities. They do not attempt to distinguish *White v. Nicholls* rationally. Instead, they rely primarily on *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

The *Noerr-Pennington* defense rests on the proposition: "Joint efforts to influence public officials do not violate

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[4] *See Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 1114 n. 12, 75 L.Ed.2d 96 (1983), where the Court also made the following comment about the specific issue decided in *White v. Nicholls*:

> The plaintiff sought damages for defendants' allegedly defamatory assertions in a petition to the President of the United States requesting the plaintiff's removal from office as a customs collector, a statement entitled at most to a qualified privilege.

[5] *See* note 3, *supra*.

the antitrust laws even though intended to eliminate competition." 381 U.S. at 670, 85 S.Ct. at 1593. The defense is based on the Court's perception that Congress did not intend by enactment of antitrust legislation to bar concerted exercise of the right to petition. In reaching this conclusion, the Court found no occasion to depart from the principles of *White v. Nicholls* or even to cite that case. Indeed, the cases are not inconsistent. *White v. Nicholls* does not purport to bar the right to petition; instead, it clothes that right with significant protection.

White v. Nicholls affirmed the common law precept that the right to petition can be abused by malice. The penalty is loss of the privilege. 3 How. at 289, 291. We do not perceive that this aspect of the case was implicitly overruled by *Noerr-Pennington*. The Court recognized that the *Noerr-Pennington* doctrine was itself subject to abuse by sham. 365 U.S. at 144, 81 S.Ct. at 533. When this is proved, the defense fails. *See California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 511-16, 92 S.Ct. 609, 612-14, 30 L.Ed.2d 642 (1972). If one equates sham with malice, each in its proper context, the error of concluding that *Noerr-Pennington* implicitly has overruled *White v. Nicholls* is readily exposed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. NORTH CAROLINA
GREENSBORO DIVISION

Civ. A. No. C-81-475-G

DAVID I. SMITH,

Plaintiff,

v.

ROBERT MCDONALD,

Defendant.

April 28, 1983

B.F. Wood, Latham, Wood & Abernathy, Graham, N.C., for plaintiff.

Bruce J. Ennis and Geoffrey P. Miller, Ennis, Friedman, Bersoff & Ewing, Washington, D.C., McNeill Smith and H. Miles Foy, III, Smith, Moore, Smith, Schell & Hunter, Greensboro, N.C., for defendant.

MEMORANDUM OPINION

BULLOCK, District Judge.

David I. Smith, a citizen of the State of North Carolina, filed this action for libel in the North Carolina General Court of Justice, Superior Court Division of Alamance County, on July 24, 1981. The complaint alleges that, following the general election of 1980, Smith applied for the position of United States Attorney for the Middle District of North Carolina and that he was being "seriously considered" for such position by the relevant authorities. Smith's cause of action is based upon

two letters written by the Defendant, Robert McDonald, and sent by him to the President of the United States, Ronald Reagan, urging the President not to appoint Smith as United States Attorney. Copies of the letters were also allegedly mailed by McDonald to several members of Congress, to Edwin Meese, Chief Counselor to the President and Chairman of the Transition Team, and to William Webster, Director of the Federal Bureau of Investigation.

The complaint states that McDonald composed the letters "wilfully and maliciously and with evil and wicked intent." Smith also alleges that the letters contain:

> [F]alse, slanderous, libelous, inflamatory [sic] and derogatory statements and allegations of and concerning the plaintiff . . . that the defendant knew . . . were false and untrue and that same were made with the specific and malicious intent to harm the plaintiff in his personal life and in his profession as an attorney . . . and for the further express and malicious purpose of harming and damaging the plaintiff's application and chances to be appointed as the United States Attorney for the Middle District of North Carolina.

Complaint, ¶ 5.

Smith was not selected by the President to serve as U.S. Attorney and thereafter commenced this action in state court. On August 25, 1981, McDonald petitioned for removal to this court pursuant to 28 U.S.C. § 1441. In the petition McDonald argued that he was a citizen of the Commonwealth of Virginia on the date this action was filed and that, therefore, the court had original diversity jurisdiction over the subject matter. *See* 28 U.S.C. § 1332.

On September 24, 1981, McDonald moved pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the complaint for fail-

ure to state a claim upon which relief could be granted. The motion was based upon McDonald's contention that communications made to an appointing authority regarding the character and qualifications of a candidate for public office are entitled to an absolute privilege under the common law. On October 2, 1981, Smith filed a motion to remand the case to state court on the grounds that McDonald was a citizen of the state of North Carolina on the date the action was commenced. Both McDonald's motion to dismiss and Smith's motion to remand were denied by the Honorable Eugene A. Gordon, United States District Judge for the Middle District of North Carolina, by order dated March 19, 1982.

The matter currently before the court is McDonald's motion for judgment on the pleadings. Fed.R.Civ.P. 12(c), filed along with his answer on August 9, 1982. The crux of McDonald's argument rests upon his contention that the conduct with which he is charged by Smith is absolutely privileged under the "petition" clause of the first amendment of the Constitution of the United States. Restricting its consideration solely to the constitutional issues addressed by the parties,[1] the court determines that McDonald is entitled to only a qualified privilege under the first amendment and that his motion for judgment on the pleadings must therefore be denied.

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[1] This case apparently involves a North Carolina plaintiff who sought a Presidential appointment to a job in North Carolina and a Virginia defendant who allegedly composed libelous letters while living in North Carolina. The letters were then sent to Washington, D.C., to the Office of the President, other executive branch officials, a Congressman from California, and Congressmen from North Carolina. Hidden somewhere within this scrambled factual scenario is a troublesome question concerning choice of law. The court specifically does not now decide that question since it has not yet been fully developed factually nor briefed by the parties. However, resolution of the conflicts issue is mooted to the extent the court finds that the elements Smith must establish to recover are dictated by the first amendment.

I. COMMON LAW ELEMENTS OF AN ACTION FOR LIBEL

In order to consider McDonald's claim of constitutionally-based "privilege," the court finds it necessary to review the elements of an action for libel in conjunction with the common law defense of "privilege." For guidance, the court turns to decisions by the North Carolina courts.

A libel, as applied to individuals, as a malicious publication expressed either in printing or writing or by sign or picture tending to blacken the memory of one dead or the reputation of one alive and to expose him to public hatred, contempt, or ridicule. *Davis v. Askin's Retail Stores, Inc.*, 211 N.C. 551, 191 S.E. 33, 34 (1937). To constitute a "publication" of allegedly defamatory matter, it is necessary that some third person understand the defamatory matter. *Wright v. Commercial Credit Co.*, 212 N.C. 87, 192 S.E. 844, 845 (1937). Letters written to public officials commenting on the fitness of subordinates have been found to constitute "publication" for purposes of maintaining an action for libel. *Angel v. Ward*, 43 N.C.App. 288, 258 S.E.2d 788 (1979); *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891). *Also see White v. Nicholls*, 44 U.S. (3 How.) 266, 11 L.Ed. 591 (1845).

Defamatory matter, written or printed, may be libelous and actionable *per se*, without any allegation of special damages, if it tends to expose the plaintiff to "public hatred, contempt, ridicule, aversion, or disgrace and to induce an evil opinion of him in the minds of right thinking persons . . . ." *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55, 60 (1938).[2] To be libelous

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[2] Under North Carolina law, there are two other classes of libel besides libel *per se*. The first of these includes publications susceptible of two interpretations, one of which is defamatory and the

per se, defamatory words must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party. Publications are to be taken in the sense which is most obvious and natural and according to the ideas they are calculated to convey.[3]

Under the common law, privilege is a question of law to be determined by the courts. *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 182 S.E.2d 410, 414 (1971); *Hartsfield v. Harvey C. Hines Co.*, 200 N.C. 356, 157 S.E. 16, 19 (1931); *Gattis v. Kilgo*, 140 N.C. 106, 52 S.E. 249, 250 (1905). Privilege is determined primarily by the occasion and circumstances under which the statement is made. *Stewart v. Nation-Wide Check Corp.*, 182 S.E.2d at 415. Privileged communications may be either "absolutely privileged" or "qualifiedly privileged." *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891).

In the state of North Carolina, when a court determines that a publication is actionable *per se* the law presumes malice and the burden is on the defendant to show that his charge is true. But in a case of absolute

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other not. The second class, termed libel *per quod*, involves publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances becomes libelous. In an action upon the first class it is for the jury to determine whether the publication was defamatory and was so understood by those who saw it. In publications which are libelous *per quod*, the innuendo and special damages must be alleged and proved. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E.2d 452, 455 (1979).

[3] *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55, 60 (1938). In *Flake*, the Supreme Court of North Carolina identified the cases where publications had been held libelous *per se* by North Carolina courts. "The decisions in this jurisdiction, as well as others, clearly establish that a publication is libelous per se, or actionable per se, if when considered alone without innuendo: (1) It charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt, or disgrace; or (4) it tends to impeach one in his trade or profession." *Id.*

privilege no action can be maintained, even though it can be shown that the charge was both false and malicious. In a case of qualified privilege, an action may be maintained if the plaintiff can prove both the falsity of the charge and that it was made with actual malice. *Hartsfield v. Harvey C. Hines Co.*, 157 S.E. at 19; *Newberry v. Willis*, 195 N.C. 302, 142 S.E. 10 (1928); *Bird v. Hudson*, 113 N.C. 203, 18 S.E. 209, 210 (1893).

Absolute privilege has been confined "by general agreement" to only those situations "where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives." PROSSER, LAW OF TORTS, § 114 (4th ed. 1971). In the state of North Carolina, absolute privilege has been limited to "words used in debate in [C]ongress and the state legislatures, reports of military or other officers to their superiors in the line of duty, everything said by a judge on the bench, by a witness in the box, and the like." *Ramsey v. Cheek*, 13 S.E. at 775. *Also see Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860, 866 (1957); *Jarman v. Offutt*, 239 N.C. 468, 80 S.E.2d 248, 251 (1954); *Mittchell v. Bailey*, 222 N.C. 757, 23 S.E.2d 829 (1943). The privilege attending communications made in the course of judicial proceedings has been extended to communications in an administrative proceeding where the administrative officer or agency is acting in a judicial or quasi-judicial function. *Angel v. Ward*, 43 N.C.App. 288, 258 S.E.2d 788, 792 (1979); *Mazzucco v. Board of Medical Examiners*, 31 N.C.App. 47, 228 S.E.2d 529, 532, *appeal dismissed*, 291 N.C. 323, 230 S.E.2d 676 (1976).

Under the common law of North Carolina, communications to public officials regarding the fitness of subordinates for public office are entitled to only a qualified privilege. *Angel v. Ward*, 43 N.C.App. 288, 258 S.E.2d 788 (1979); *Dellinger v. Belk*, 34 N.C.App. 488, 238 S.E.2d 788 (1977), *dis. rev. denied*, 294 N.C. 182, 241 S.E.2d 517 (1978); *Ponder v. Cobb*, 257 N.C. 281, 126

S.E.2d 67 (1962); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891). In such cases, the plaintiff can therefore recover only if he can prove the malicious intent of the defendant and the falsity of the statements. *Angel v. Ward*, 258 S.E.2d at 791; *Dellinger v. Belk*, 238 S.E.2d at 789; *Ponder v. Cobb*, 126 S.E.2d at 80; *Alexander v. Vann*, 104 S.E. at 361; *Ramsey v. Cheek*, 13 S.E. at 775.

Were the instant case governed solely by the common law, McDonald would be clearly entitled to only a qualified privilege.

II. CONSTITUTIONAL ISSUES

The first amendment to the United States Constitution states that: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S.C.A. Const.Amend. I. The first amendment thus expressly protects the right of the people to petition the government for a redress of grievances. That right, the Supreme Court has stated is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967).

McDonald contends that he is entitled to an absolute privilege under the "petition" clause based primarily upon two Supreme Court decisions interpreting the relationship between that clause and the Sherman Act. 15 U.S.C. § 1, *et seq.* *See Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Before directly addressing the argument advanced by McDonald, the court finds it necessary to

consider additional Supreme Court precedents it deems relevant.

Prior to the enactment of the fourteenth amendment to the Constitution, the first eight amendments clearly did not apply to the states. *Barron v. Baltimore*, 32 U.S. (7 Peters) 242, 8 L.Ed. 672 (1833). As late as 1875 the Supreme Court concluded that the first amendment "like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the state government in respect to their own citizens, but to operate upon the National government alone." *United States v. Cruikshank*, 92 U.S. (II Otto) 542, 552, 23 L.Ed. 588 (1875).

Despite this historical precedent, by 1925 the Supreme Court determined that the first amendment freedoms of speech and the press were among the fundamental personal rights and liberties protected by the due process clause of the fourteenth amendment from impairment by the states. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138 (1925). Under current constitutional precedent "[t]here is no longer any doubt" that the freedoms guaranteed by the first and fourteenth amendments are secured to all persons against abridgment by the states. *NAACP v. Button*, 371 U.S. 415, 430, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1961); *also see Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).[4]

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[4] The court is unable to determine whether the first amendment applies to the states under the theory of substantive due process, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905); *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138 (1925), or because the framers of the fourteenth amendment, "intended . . . to make the Bill of Rights, applicable to the states." *Adamson v. California*, 332 U.S. 46, 71-72, 67 S.Ct. 1672, 1686, 91 L.Ed. 1903 (1949) (Black, J., dissenting). The court would note that the historical basis for the so-called "incorporation" theory, set out by Justice Black in his dissent in *Adam-*

Turning more directly to the merits of the case before the court, it is important to observe that the Constitution of the United States guarantees first amendment freedoms "only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S.Ct. 1029, 1033, 47 L.Ed.2d 196 (1976). It could thus be reasonably argued that first amendment principles, though clearly applicable to state governments under current standards, warrant no consideration in a case concerning a civil lawsuit between private parties. This argument was rejected by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964). In that case, the plaintiff, an elected official of the City of Montgomery, Alabama, had brought a common law action for libel against defendants who had paid for and published an allegedly libelous advertisement in the New York *Times* newspaper. The relevant state law was similar to that followed in the state of North Carolina to the extent that malice and falsity were presumed upon a finding by the trial judge that the advertisement was libelous *per se*. The defendants argued that the application of the presumption of malice by the state court deprived them of their first amendment right to comment upon the conduct of public officials. *New York Times v. Sullivan*, 376 U.S. at 262, 84 S.Ct. at 716. In finding sufficient state action to apply the requirements of the fourteenth amendment, the Court stated that:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms

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son, has come under renewed scholarly attack. *See* R. Berger, *Government by Judiciary* (1977); *also see* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan.L. Rev. 5 (1949). *But see* Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 Ohio St.L.J. 89 (1982).

> of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute [citations]. The test is not the form in which state power has been applied, but, whatever form, whether such power has in fact been exercised. *See Ex parte Virginia*, 100 U.S. 339, 346-347 [25 L.Ed. 676], *American Federation of Labor v. Swing*, 312 U.S. 321 [61 S.Ct. 568, 85 L.Ed. 855].

New York Times v. Sullivan, 376 U.S. at 265, 84 S.Ct. at 718.

The first amendment, thus, applies to common law actions for libel where application by a court of a state rule of law would result in unlawful restrictions on the constitutional rights of the defendants. *Id.*

McDonald agrees that he would be entitled to only a qualified privilege if the only first amendment interests at stake were his right to free speech. Under the *New York Times* standard, the first amendment requires that in libel actions brought by public officials the plaintiff must prove that the defendant published a defamatory statement with actual malice. *New York Times v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-726. Actual malice was defined by the Court as knowledge of falsity or reckless disregard of the truth. *Id.* Malice cannot be presumed on the grounds that the words are libelous *per se*. *Id.* at 283, 84 S.Ct. at 727. Malice must instead be proven by evidence of "convincing clarity." *Id.* at 285, 286, 84 S.Ct. at 728, 729; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52, 91 S.Ct. 1811, 1824, 29 L.Ed.2d 296 (1971). *Also see Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions Through Application of the Noerr-Pennington Doctrine*, 31 Am.U.L.Rev. 147, 150 (1981).

The defendants in *New York Times* argued that Alabama law imposed invalid restrictions on only their con-

stitutional freedoms of speech and press. *New York Times v. Sullivan*, 376 U.S. at 265, 84 S.Ct. at 718. McDonald argues, and the court agrees, that decisions interpreting the "speech" clause of the first amendment do not necessarily control cases concerning the "petition" clause. For, as Chief Justice Marshall once stated, "It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174, 2 L.Ed. 60 (1803).

Though McDonald contends that this court is not bound by Supreme Court decisions concerning the "speech" clause of the first amendment, he is unable to cite any decisions by that Court where the relationship between the "petition" clause and actions for libel is discussed directly or by implication. Instead, McDonald seeks to have this court find his communications absolutely privileged based upon Supreme Court cases interpreting the relationship between the petition clause and the Sherman Act. 15 U.S.C. § 1 *et seq.* For the reasons hereafter discussed, the court finds that McDonald's reliance on those decisions is misplaced.

In *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), a group of trucking companies and their trade associations brought suit primarily against a group of railroads, for conspiring to restrain trade in and monopolizing the long-distance freight business in violation of §§ 1 and 2 of the Sherman Act.[5] The truck-

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[5] The relevant provisions respectively state:

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared illegal . . . .

15 U.S.C. § 2. Monopolizing trade a felony. Every person who shall monopolize, or attempt to monopolize, or combine or con-

ing companies alleged that railroads had conducted a publicity campaign against the trucking industry in order to foster the "adoption and retention of laws and law enforcement practices destructive to the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationship existing between the truckers and their customers." *Noerr*, 365 U.S. at 129, 81 S.Ct. at 525. The Supreme Court rejected the truckers' contention that the Sherman Act's sanctions against combinations in restraint of trade and monopolies applied to the activities engaged in by the railroads, which the Court characterized as "group solicitation of government action." 365 U.S. at 139, 81 S.Ct. at 530. The Court stated that:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Noerr, 365 U.S. at 139, 81 S.Ct. at 530.

The Court in *Noerr* observed that the evidence indicated that the publicity campaign "deliberately deceived the public and public officials." 365 U.S. at 145, 81 S.Ct. at 533.[6] However, the Court concluded that the Sherman

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spire with any other person or persons, to monopolize any part of the trade of commerce among the several states, or with foreign nations, shall be deemed guilty of a felony . . . .

[6] The "deception" referred to by the Court did not concern libelous allegations made against the truckers, but instead involved the tactics used by the railroads in conducting their publicity campaign. "[T]he publicity matter in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups, when, in fact, it was largely . . . paid for by the railroads." *Noerr*, 365 U.S. at 130, 81 S.Ct. at 525. Though the

Act was not violated by "campaigns to influence legislation and law enforcement." *Id.*

In *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), an independent coal company charged the United Mine Workers and certain coal companies with conspiring to restrain and to monopolize interstate commerce, in violation of §§ 1 and 2 of the Sherman Act. The plaintiff alleged that defendants had lobbied the Secretary of Labor and to raise wage determinations under the Walsh-Healey Act and had also urged the Tennessee Valley Authority to curtail its "spot market" purchases of coal, a substantial portion of which was exempt from the Walsh-Healey wage determination. The plaintiff claimed that the ultimate purpose of defendants' lobbying efforts was to eliminate competition by driving smaller companies, unable to pay Walsh-Healey wage rates, out of business. *Pennington*, 381 U.S. at 659-61, 85 S.Ct. at 1587-1588.

In concluding that the UMW and the defendant coal companies were immune from Sherman Act liability, the Supreme Court determined that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of *intent or purpose*." 381 U.S. at 670, 85 S.Ct. at 1593 (emphasis added). More specifically the Court stated that "[j]oint efforts to influence public officials do not violate the anti-trust laws even though *intended to eliminate competition*." *Id.* (emphasis added).

McDonald argues that writing a letter to the President concerning the fitness of a candidate for United States Attorney falls within the category of activity protected by the petition clause. McDonald further reasons that

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defendants were shielded from anti-trust liability, despite their deception regarding the staging of the publicity campaign, it does not necessarily follow that the same defendants would be immune from tort liability if during the course of the campaign they published charges about their competitors they knew to be false.

Noerr-Pennington insulates any type of conduct that can be characterized as petitioning activity not only from the Sherman Act, but all other types of civil liabilty.

Addressing first McDonald's second contention, the court determines that the Defendant has misread the scope of the *Noerr-Pennington* rulings. In both cases, the Supreme Court was called upon to construe the congressional intent behind the Sherman Act in light of a possible conflict with the constitutionally-protected right to petition the government.[7] As this court interprets those rulings, it finds that the Supreme Court ruled only that Congress did not intend to regulate through the Sherman Act combinations to influence government decisionmakers by publicity campaigns, lobbying, or the use of the channels and procedures of state and federal agencies,[8] even where the *intentions and purposes* of those involved in the combinations are *anti-competitive and monopolistic.*

> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination[s] . . . in restraint of trade,' they bear very

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[7] The Supreme Court in *Noerr* clearly determined that adopting the interpretation of the Sherman Act offered by the plaintiffs in that case could cause a possible conflict with the first amendment. "[S]uch a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Noerr*, 365 U.S. at 137, 138, 81 S.Ct. at 529, 530.

[8] *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972).

> little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or an implied agreement or understanding that the participants will jointly give up their trade freedom or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arangements . . . . [A]nd we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

Noerr, 365 U.S. at 136, 137, 81 S.Ct. at 528, 529.

Though the court rejects McDonald's interpretation of the *Noerr-Pennington* decisions, it does conclude that the defendant's alleged conduct falls within the general protection afforded by the petition clause of the first amendment. For guidance, the court has reviewed decisions by the Supreme Court concerning libel actions arising out of the District of Columbia. The District was created by Congress by the Act of July 16, 1790, I Stat. 130. All subjects of legislation within the District must therefore be consistent with the Constitution of the United States. *District of Columbia v. Thompson Co.*, 346 U.S. 100, 104, 105, 73 S.Ct. 1007, 1009, 1010, 97 L.Ed. 1480 (1953). The federal protections afforded citizens of the several states through the fourteenth amendment, as it is construed today, have therefore always been directly available to the citizens of the District through operation of the Bill of Rights. *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). *Also see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 380-84, 94 S.Ct. 2997, 3027-3028, 41 L.Ed.2d 789 (1974) (White, J., dissenting).

The court's review of District of Columbia cases has been enlightening. In *White v. Nicholls*, 44 U.S. (3 How.) 266, 11 L.Ed. 591 (1845), the defendants were charged with libeling the plaintiff, Robert White, collector of customs for the Port of Georgetown. The libel took the form of letters addressed to the President of the United States, John Tyler, which contained allegations concerning White's fitness for public office. White filed exceptions with the Supreme Court after the lower court refused to allow White to introduce the letters into evidence at trial. *Id.* at 275-78.

On appeal, counsel for both the plaintiff in error, White, and for the defendants acknowledged that constitutional issues lurked beneath the common law questions raised by the lower court's ruling.[9] The ruling of the lower court was defended by the defendants on two grounds: that the communications were absolutely privileged since defendants had complained of a grievance to the officer who could redress it and that if the communication was not absolutely privileged, "yet it was so much so as to compel the plaintiff to show that the acts were done without probable cause and with malice and that White has failed to make such averments in his declaration." *Id.* at 281.

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[9] Counsel for White argued before the Supreme Court that: " 'Under the free dispensation of our Constitution and laws, where the greatest liberty of speech and of publication is allowed, and where this liberty, under the heat of political passions, is ever tending towards licentiousness, in assaults upon political adversaries who may be enjoying in office the fruits of party success, the questions here presented become most interesting, and the decisions that your honors may pass upon them will ascertain the value of that great right, to this description of citizens, "of being secure in their good reputation." ' " *White v. Nicholls*, 44 U.S. at 281.

Defense counsel raised the constitutional issue by arguing that the publication was sent to the President not " 'for the purpose of injuring the plaintiff's character, but solely for the purpose of obtaining his removal from office. It was a perfectly constitutional proceeding . . . .' " *Id.* at 282.

The Supreme Court concluded that the lower court had erred in keeping the letters from the jury and that the letters could be considered by the jury on the question of malice by the defendants. *Id.* at 291. The Court rejected, first, defendants' contention that White had not adequately pled malicious conduct in his declaration. *Id.* at 284. The Court also ruled that, while the letter to President Tyler could be considered a petition for the redress of grievances, any privilege that attached to the letter was lost if the communication was made maliciously. In so holding, the Court commented that:

> The exposition of the English law of libel given by Chancellor Kent in the second volume of his Commentaries, part 4th, p. 22, we regard as strictly coincident with reason as it is with the modern adjudications of the courts. That law is stated by Chancellor Kent, citing particularly the authority of Best, J., in the case of *Fairman v. Ives*, 5 Barn & Ald., 642 to the following effect: "That petitions to the king or to parliament, or the secretary of war, for redress of any grievance, are privileged communications, and not actionable libels, provided the privilege is not abused. But if it appears that the communication was made maliciously, and without probable cause, the pretext under which it was made aggravates the case, and an action lies."

White v. Nicholls, 44 U.S. at 288.

As this court reads *White v. Nicholls*, it is led to the inescapable conclusion that the Supreme Court of 1845 would have ruled accordingly if there were any basis for finding that the first amendment afforded an absolute defense to a libel action that was unavailable at common law in the District of Columbia, a jurisdiction where the Federal Constitution was applicable. The defense found to be available to the defendants in *White v. Nicholls* was thus one of qualified privilege. The qualified privi-

lege so available appears identical to the privilege available to similarly situated defendants in the state of North Carolina who have complained to public officials regarding the fitness of their subordinates. *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67, 78 (1962); *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920); *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891).

III. POLICY ISSUES

McDonald argues that he is entitled to judgment on the pleadings even if the court fails to find that his alleged conduct herein is absolutely protected by the petition clause of the first amendment due to the special circumstances of this case. McDonald advances various arguments in support of this contention. In a nutshell, McDonald requests that this court declare his conduct absolutely privileged from liability for defamation based upon public policy considerations if not upon clear constitutional precedent. The court finds the cumulative weight of McDonald's policy arguments to be unconvincing. It is the Congress, not the federal judiciary, that is assigned the policy-making role in the federal system. Our elected representatives might well conclude that defendants like McDonald must be insulated from liability in order to encourage those with relevant information regarding presidential appointees to come forward. Whether such a policy is sound is not, however, within the province of a district court.

If the court were inclined towards fashioning public policy, it could find no basis for concluding that the policies protected by or related to the petition clause were of more significance than the policies advanced by the speech clause. For, as the Supreme Court has stated in a case interpreting the speech clause, "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people, and that changes may be obtained by lawful means, an op-

portunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931).

Despite their fundamental nature, first amendment rights have never been considered to be absolute and may in fact be restricted to the extent such restrictions serve a superior governmental interest. *Abood v. Detroit Board of Education*, 431 U.S. 209, 222-32, 97 S.Ct. 1782, 1792-1798, 52 L.Ed.2d 261 (1977); *Civil Service Commission v. National Assn. of Letter Carriers*, 413 U.S. 548, 564-67, 93 S.Ct. 2880, 2889-2891, 37 L.Ed.2d 796 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 606, 93 S.Ct. 2908, 2912, 37 L.Ed.2d 830 (1973). As Justice Holmes observed, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . . ." *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919). Consistent with this traditional recognition that the first amendment has its limits, the Supreme Court has found previously that complete immunity from liability for defamation is "an untenable construction of the first amendment." *Herbert v. Lando*, 441 U.S. 153, 176, 99 S.Ct. 1635, 1648, 60 L.Ed.2d 115 (1979).[10]

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[10] McDonald's primary argument for absolute privilege is premised largely upon two Supreme Court decisions in which the Sherman Act was interpreted as not reaching combinations to influence government officials. *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mineworkers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). *See supra* at 836-838. Yet, even McDonald acknowledges that the anti-trust immunity afforded by these decisions has its limits. As the Supreme Court ruled in a third Sherman Act case, "[f]irst amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515, 92 S.Ct. 609, 614, 30 L.Ed.2d 642 (1972). Therefore, while a carrier, in combination with others, has the right of access to agencies

The *New York Times* decision was rendered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. at 270, 84 S.Ct. at 720. The court finds it difficult to discern how the interests and policies affected by the action now before it can be in any way different from those considered by the Supreme Court in *New York Times*.

This court is not the first judicial body to find an identity of interests underlying both the rights of "petition" and free speech. In that regard, the court notes that when the Supreme Court fashioned the requirements that plaintiffs must meet to recover in libel actions involving issues of free speech, it looked for guidance to the North Carolina decision of *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962). *See New York Times v. Sullivan*, 376 U.S. at 280, n. 20, 84 S.Ct. at 726, n. 20. In *Ponder v. Cobb*, county election officials sued the defendant for libel after the defendant had written letters to state officers critical of the election officials. The State Supreme Court concluded that the defendant was entitled to a qualified privilege "since the letters involved in these actions were addressed to . . . proper parties from or through whom redress might be expected." *Ponder v. Cobb*, 126 S.E.2d at 78. Thus, the *New York Times* standard that plaintiffs may recover in cases involving issues of free speech only upon a showing of actual malice, *New York Times v. Sullivan*, 376 U.S. at 280, 84 S.Ct. at 726, was based, at least in part, on the common law protection afforded

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and courts, within the limits of their proscribed procedures, to defeat applications of its competitors for certificates as highway carriers (and thereby eliminating the applicants as competitors), the combination may not, consistent with the Sherman Act, conspire to bar the same competitors their rightful access to those same agencies and courts. *Id.*

in North Carolina to those who petition the government for the redress of grievances.[11]

IV. CONCLUSION

The court has reviewed the decision by lower federal courts cited by McDonald where the *Noerr* and *Pennington* holdings of the Supreme Court have been applied. To the extent those decisions interpret provisions of the Sherman Act, the court finds them inapplicable. To the extent those decisions apply *Noerr-Pennington* to other areas of the law, the court is persuaded by the ruling of the Seventh Circuit Court of Appeals in *Stern v. United States Gypsum*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed.2d 467 (1977). In *Stern*, an Internal Revenue agent brought an action under 42 U.S.C. § 1985 against a corporation and its officers who had filed complaints concerning the agent's performance. Plaintiff also invoked the district court's pendent jurisdiction over several state claims, including defamation. Defendants argued that under the *Noerr* and *Pennington* decisions their conduct was absolutely privileged under the petition clause of the first amendment.

The Court of Appeals concluded that the act of filing complaints about government officials with their superiors fell within the constitutionally-protected right to petition for the redress of grievances. *Stern v. United States Gypsum*, 547 F.2d at 1342, 1343. However, dismissal of the § 1985 claim was found warranted, not because of the absolute nature of the right to petition, but due to the absence of any congressional intent to regulate the right of petition by way of § 1985. *Id.* at 1344. The state action for defamation was therefore dismissed for want of a federal question. *Id.* at 1346. Despite order-

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[11] The circle is neatly completed by also noting the identical nature of the protection afforded those who petitioned President Tyler for the redress of grievances in *White v. Nicholls*. *See supra* at 838-840.

ing the dismissal of the action in its entirety, the Seventh Circuit observed that:

> We have no quarrel with the proposition that a state's interest in protecting its citizens from common law torts justifies overriding these First Amendment considerations, when knowing falsity is alleged, and although expressing no opinion one way or the other, we are not to be understood as implying that Stern's [the plaintiff's] common law theories are unmeritorious. A similar overriding of the right to petition might likewise be sustainable in federal legislation which clearly and narrowly intended the effect.

Stern v. United States Gypsum, 547 F.2d at 1345.

The court has also considered and declines to follow the decision of the West Virginia Supreme Court in *Webb v. Fury*, 282 S.E.2d 28 (W.Va. 1981). For reasons discussed above, this court respectfully concludes that the majority in *Webb v. Fury* has extended the scope of the *Noerr-Pennington* rationale far beyond its proper boundaries.

The court concludes that the matter now before it is controlled by the principles of *White v. Nicholls*, 44 U.S. (3 How.) 266, 11 L.Ed. 591 (1845), and *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and its progeny. In rejecting McDonald's request to fashion an absolute privilege based solely upon public policy, the court is guided by the observation of Justice Holmes that "If a thing has been practiced for two hundreds years by common consent, it will need a strong case for the fourteenth amendment to affect it . . . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S.Ct. 9, 9-10, 67 L.Ed. 107 (1922). Liberty, the Constitution, and the Federal Government have together survived in this country for close to 200 years despite the fact that defendants like McDonald have been unable to assert a defense of absolute privilege in actions against them for libel.

The court is further guided by a past Supreme Court opinion interpreting the speech clause, which the court finds equally relevant to the petition clause:

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of languange and prevents the punishment of those who abuse freedom. [citations] Reasonably limited, it was said by Story [citations] . . . this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

Gitlow v. New York, 268 U.S. 652, 667, 45 S.Ct. 625, 630, 69 L.Ed. 1138 (1925).

Reasonably limited, the right to petition is of inestimable value to the republic. Without any limitations, the right to petition, in the court's opinion, would render itself meaningless. The right of petition presumes that the government will employ individuals with the abilities needed to redress the legitimate grievances of its citizens. Men and women of competence and integrity clearly would be discouraged, if not entirely dissuaded, from assuming public office if such a sacrifice also required the waiver of *all defenses* against libelous attacks no matter how malicious and false. See *White v. Nicholls*, 44 U.S. at 284.

For all the reasons discussed above, the court will deny McDonald's motion for judgment on the pleadings. The test applicable for judgment on the pleadings is whether or not, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or whether the case can be decided as a matter of law. *King v. Gemini Food*

Services, Inc., 438 F. Supp. 964, 966 (E.D.Va. 1976), *aff'd*, 562 F.2d 297 (4th Cir. 1977), *cert. denied*, 434 U.S. 1065, 98 S.Ct. 1242, 53 L.Ed.2d 766 (1978). McDonald is not entitled to judgment as a matter of law since Smith can prevail provided he proves actual malice by McDonald. *New York Times v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-726. In order to establish McDonald's actual malice at trial, Smith will be required to introduce evidence of "convincing clarity" [12] that McDonald knew that the statements contained in the letters to President Reagan were false or that he acted in "reckless disregard" of the truth of said allegations.

An Order will be entered accordingly.

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[12] *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 52, 91 S.Ct. at 1824.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1509

DAVID I. SMITH,

Appellee,

v.

ROBERT MCDONALD,

Appellant.

Appeal from the United States District Court
for the Middle District of North Carolina

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greaceu
Clerk

[Filed Jun. 28, 1984]

No. 84-476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT MCDONALD,

Petitioner,

v.

DAVID I. SMITH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Can a defendant, who knowingly makes a false statement about an applicant for a Presidential appointment, rely on any privilege provided by the Petition Clause of the First Amendment, even though the statements were published to persons unrelated to the formal appointment process and, if so, is the applicable privilege qualified or absolute?

2. If such a defendant can rely on the privilege but it is not absolute, should this Court now consider whether the Petition Clause requires increased procedural protections, including judicial discretion to award costs and legal fees to a defendant if he ultimately prevails?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-476

ROBERT MCDONALD,

Petitioner,

v.

DAVID I. SMITH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Fourth Circuit's opinion, which is reproduced at pages 1a through 6a of the Appendix A to the Petition, contains a concise statement of the relevant facts and the proceedings in the District Court. 737 F.2d 427, 427-28 (4th Cir. 1984).

The district court determined that McDonald was not entitled to judgment on the pleadings pursuant to a privilege provided by the Petition Clause of the First Amendment because the available privilege is not absolute, but qualified. Petition, App. B at 9a. The Fourth Circuit

affirmed that ruling on the same ground. Petition, App. A at 3a.

It was unnecessary to the denial of judgment on the pleadings to determine whether McDonald's publication to persons unrelated to the appointment process[1] would deny him even a qualified privilege, and neither court below addressed the question.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

The Fourth Circuit is the only circuit found to have determined the relationship between a state's interest in protecting its citizens from common law torts and the rights under the Petition Clause, when knowing falsity is alleged. The courts below determined that this Court's *Noerr-Pennington* decisions[2] left undisturbed "the common law precept that the right to petition can be abused by malice," and pointed out that abuse of the right to petition was recognized by the doctrine itself. Petition, App. A at 6a; *see Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961). Such a determination is entirely consistent with the decisions of other circuits. McDonald's contrary claims, Petition at 10-13, misrepresent the holdings of cases in other circuits to present an illusion of conflict where none exists.

McDonald claims that two circuit court decisions conflict with the Fourth Circuit below, *Stern v. United*

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[1] McDonald admits allegation of such publication. Petition at 2 n.2.

[2] *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978), and *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980). Petition at 11. *Stern* and *Gorman Towers* were each claims both under specific statutes and under state common law tort principles. 626 F.2d at 609 (claim under 42 U.S.C. § 1983); 547 F.2d at 1331-32 (claim under 42 U.S.C. § 1985(1)). In each, the circuit court followed the reasoning of *Noerr-Pennington* to find that Congress did not intend to address petitioning behavior by the statute in question. 626 F.2d at 614-15; 547 F.2d at 1344 (*Noerr-Pennington* "provides a useful analogy"). Neither *Stern* nor *Gorman Towers* had occasion to decide the relationship between state common law tort principles and the Petition Clause because both dismissed the state law claim for lack of remaining federal question. 626 F.2d at 616; 547 F.2d at 1344.

The Seventh Circuit, however, expressed its general agreement with the position now adopted by the Fourth Circuit. The *Stern* court stated:

> We have no quarrel with the proposition that a state's interest in protecting its citizens from common law torts justifies overriding . . . First Amendment considerations when knowing falsity is alleged, and although expressing no opinion one way or the other *we are not to be understood as implying that Stern's common law [defamation] theories are unmeritorious.* A similar overriding of the right to petition might likewise be sustainable in federal legislation which clearly and narrowly intended that effect.

Stern v. United States Gypsum, Inc., 547 F.2d at 1345 (emphasis added).

McDonald boldly states that *Stern* and *Gorman Towers* decide what they refused to decide. In doing so, he refuses to distinguish between cases based on *Noerr-Pennington* and the absence of Congressional intent to

limit petitioning behavior by particular statutes, on the one hand, and the interaction between state common law torts and the Petition Clause, on the other. McDonald, thereby, attempts to produce the illusion of conflict, even though none exists.[3] Both *Stern* and *Gorman Towers* recognize an absolute immunity for the respective defendants from liability pursuant to specific statutes, but neither expands that immunity to deny tort liability and the *Stern* court indicates that it would not.

II. THE STATE CASES UPON WHICH McDONALD RELIES WOULD EXCLUDE PETITIONER'S BEHAVIOR FROM ANY FIRST AMENDMENT PRIVILEGE, THEREBY PRECLUDING JUDGMENT ON THE PLEADINGS.

McDonald seeks this Court's review based upon a conflict between the Fourth Circuit decision below and decisions of the highest courts of Maryland and West Virginia. Petition at 6-10. Both *Sherrard v. Hull*, 296 Md. 189, 460 A.2d 601, *affirming* 53 Md. App. 553, 456 A.2d 59 (1983), and *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981), hold that the First Amendment provides an absolute privilege from tort liability for petitioning behavior. Both cases, however, define petitioning activity in such a way that McDonald's defamation would be excluded from any privilege at all and neither court would grant him judgment on the pleadings.

"Inherent in the words 'petitioning for redress of grievances' is the concept that the words contained in the petition will relate to the redress sought and that the

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[3] It is also significant to note that *Stern* gives considerable weight to the fact that the statements involved were made directly to the appropriate federal official (the supervisor of the plaintiff IRS officer) and that an administrative procedure existed for the plaintiff to vindicate himself. 547 F.2d at 1344. McDonald neither limited his libelous "petition" to the officers associated with his grievance, nor is there any avenue available to Smith for vindication except this action. *See, infra*, sec. III.

petitioner is genuinely seeking redress." *Sherrard v. Hull*, 456 A.2d at 71. *Sherrard* found that the defendant's behavior was protected, if the jury determined that she was seeking redress of grievances caused by the county commissioners to whom she was speaking and who "had the power to address many of the concerns she raised." *Id.* at 70. Properly directing the petition is, therefore, necessary to the privilege the Maryland court found. *Id.* at 71; *see Bass v. Rohr*, 57 Md. App. 609, 471 A.2d 752, 758, *cert. granted*, 300 Md. 88, 475 A.2d 1200 (1984) (finding the same privilege where petition directed to the administrative agency whose "function[] is to receive and consider consumer complaints.").

Similarly, the West Virginia Supreme Court found a privilege where the petition was made "through 'proper and established channels.'" *Webb v. Fury*, 282 S.E.2d at 39. There the defendant had complained about the plaintiff's surface mining practices to the Office of Surface Mining, "the agency charged with enforcement of the Surface Mining Reclamation Act," and to the Environmental Protection Agency, "the agency charged with enforcing and licensing the discharge of materials into water courses under the Clean Water Act." *Id.* at 37. The West Virginia Supreme Court determined that such petitions are "actually encouraged under the citizen participation provisions of [the two federal statutes]." *Id.* at 37-38.

The *Webb* court quoted with approval the Seventh Circuit's language in *Stern* addressing improperly presented complaints:

> A scurrilous anonymous letter or *an attempt to marshall political clout to ruin* an offending [IRS] agent would certainly present different cases than does this open straightforward petition lodged through what the parties agree to be the proper and established channels.

Id. at 39 (quoting *Stern v. United States Gypsum, Inc.*, 547 F.2d at 1343) (emphasis added).

McDonald admits that Smith has alleged properly that the libel was published to persons unrelated to the appointment process. Petition at 2, n.2. Therefore, the libel could not be privileged petitioning activity under the West Virginia and Maryland decisions. Rather it is "an attempt to marshall political clout to ruin" Smith and, therefore, a much "different case[]" than the petitions considered in those state cases. *Webb v. Fury*, 282 S.E. 2d at 39 (quoting *Stern*, 547 F.2d at 1343).[4]

Resolution of the conflict between the Fourth Circuit below and the highest courts of Maryland and West Virginia would not result in granting McDonald's motion for judgment on the pleadings. A trial would be necessary in this case under either construction of the Petition Clause. *See Sherrard v. Hull*, 456 A.2d at 70 ("a directed verdict for either party would have been inappropriate"). Resolution of the conflict between the Fourth Circuit and the highest courts of Maryland and West Virginia would not result in judgment on the pleadings, thereby avoiding trial in this case, and the result at trial might well avoid any occasion to determine any Constitutional issue between these parties.

III. THE FOURTH CIRCUIT PROPERLY RELIED UPON A RELEVANT DECISION OF THIS COURT.

The decisions below follow an early, but undisturbed, ruling of this Court, *White v. Nicholls*, 44 U.S. (3 How.)

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[4] *Webb* goes on to find a publicity campaign to be protected as petitioning behavior and as free speech. *Webb v. Fury*, 282 S.E.2d at 43. Even were this Court to agree with such a construction of *Noerr-Pennington*, the publication here was not to the public generally, where ideas clash to mold public opinion and thereby influence policy. *See id.* at 42. Rather, McDonald's publications were to selected persons possibly in a position to exercise the "political clout to ruin" Smith, the very activity excluded by *Webb* from any privilege. *Id.* at 39.

266 (1845).[5] Petition, App. A. at 3a, App. B at 22a-24a. Respondent Smith, like the district court,

> is led [by *White*] to the inescapable conclusion that the Supreme Court of 1845 would have ruled accordingly if there were any basis for finding that the first amendment afforded an absolute defense to a libel action that was unavailable at common law in the District of Columbia, a jurisdiction where the Federal Constitution was applicable.

Id. at 23a.

McDonald presents three arguments in its attempt to discredit the lower courts' reliance upon *White*. First, he argues that "*White* was decided well before the First Amendment, including the Petition Clause, was held to apply to state action at all." Petition at 20. This argument is meritless. *White* was a District of Columbia case and the First Amendment was applicable to the District of Columbia, as the court below clearly stated. Petition, App. B at 23a.

Second, McDonald argues that "*White* was not a constitutional case at all." Petition at 20. In *White*, however, "Defense counsel raised the constitutional issue . . . ," as the district court below specifically noted. Petition, App. B at 22a n.9. This Court recognized in *White* that a petition was involved and determined, applying common law principles, that no absolute privilege existed. *White v. Nicholls*, 44 U.S. at 288. The district

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[5] McDonald misrepresents this Court's recent treatment of *White*. This Court declined to rely on dicta in *White* addressing a question presented neither by *White* or this case. *Briscoe v. LaHue*, 460 U.S. 325, 332 n.12 (1983). Citing that footnoted treatment of dicta, McDonald represents that the Court opined that *White* was neither a reliable statement of the common law, nor authoritative. Petition at 20 n.22. The Court did neither; it merely stated that White's "discussion of privileged statements in judicial proceedings was purely dictum" and that, as to such statements, *White* "cannot be considered authoritative." *Id.*

court reasonably concluded that, if some greater privilege existed under the Constitution than at common law, this Court would have so held. McDonald's contrary argument rests upon the absurd proposition that this Court would fail to apply the Constitution in deciding a case in which a constitutional issue was raised and would have required a different result.

Third, McDonald argues that the Fourth Circuit interpreted the *Noerr-Pennington* decisions in a way inconsistent with the interpretations of the Seventh and Eighth Circuits. Petition at 10-13, 21. As discussed above, no such conflict exists.

IV. ANY CLAIM FOR JUDICIAL DISCRETION TO AWARD ATTORNEY'S FEES TO PREVAILING DEFENDANTS MUST BE PRESENTED BY A PREVAILING DEFENDANT.

McDonald seeks to have this Court determine what rights he might have were he to prevail at trial. Petition at i, 19. Understandably neither court below addressed this question, as McDonald has not prevailed.

To consider the hypothetical question presented would not comport with this Courts well-established view of its role. As to these parties, no ripe case or controversy exists concerning the rights of prevailing libel defendants. *See* U.S. Const., Art. III.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

B. F. WOOD
(Counsel of Record)
WILLIAM A. EAGLES
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10 N.W. Court Square
P. O. Box 997
Graham, N.C. 27253
(919) 227-2460
Council for Respondent

November 6, 1984

(3)

No. 84-476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT MCDONALD,

Petitioner,

v.

DAVID I. SMITH,

Respondent.

Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1984
CERTIORARI GRANTED NOVEMBER 26, 1984

22pp

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RELEVANT DOCKET ENTRIES

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July 9, 1982	Defendant's Answer
July 9, 1982	Defendant's Motion For Judgment on The Pleadings pursuant to Rule 12(c)
July 9, 1982	Defendant's Memorandum In Support of Motion for Judgment on the Pleadings
August 19, 1982	Plaintiff's Brief In Opposition to Defendant's Motion For Judgment on the Pleadings
October 28, 1982	Defendant's Reply to Plaintiff's Brief In Opposition To Defendant's Motion For Judgment on the Pleadings
1983	
February 4, 1983	Transcript of Hearing on Defendant's Motion For Judgment on the Pleadings (filed August 15, 1983)
April 28, 1983	Memorandum Opinion denying Plaintiff's Motion For Judgment on the Pleadings
April 28, 1983	Order denying Plaintiff's Motion For Judgment on the Pleadings
May 18, 1983	Defendant's Notice of Appeal to the Fourth Circuit
July 29, 1983	Appellant's Brief and Joint Appendix
August 30, 1983	Appellee's Motion to Dismiss Appeal

August 31, 1983	Appellee's Brief
September 31, 1983	Appellant's Reply Brief
June 28, 1983	Opinion of the Fourth Circuit
June 28, 1983	Judgment of the Fourth Circuit affirming the District Court's Order of April 28, 1983

COMPLAINT, WITH EXHIBITS A AND B
(July 24, 1981)

IN THE GENERAL COURT OF JUSTICE
SUPERIOR DIVISION

---

81 CVS 1088

NORTH CAROLINA
ALAMANCE COUNTY

DAVID I. SMITH,
Plaintiff,

—VS—

ROBERT MCDONALD,
Defendant.

COMPLAINT

The plaintiff, complaining of the defendant, alleges:

1.

That the plaintiff is a citizen and resident of Alamance County, North Carolina.

2.

That the defendant is a citizen and resident of Alamance County, North Carolina.

3.

That the plaintiff is an attorney and counselor at law, having been duly licensed by the State of North Carolina to practice law in the various courts of said state in September of 1964, and that at all times herein complained

of the plaintiff was practicing his profession as an attorney at law in Alamance County and surrounding areas.

4.

That subsequent to the 1980 General Election it was known there would be a vacancy for the office of United States Attorney for the United States District Court, Middle District of North Carolina. That plaintiff, individually and by and through numerous friends and associates, made application for this position and plaintiff is informed, believes and so alleges that he was being seriously considered for the position prior to the malicious acts and conduct of the defendant as herein set forth.

5.

That on or about December 1, 1981, the defendant, wilfully and maliciously and with evil and wicked intent wrote a letter addressed to "The Honorable Ronald Reagan, President-Elect of the United States, 901 South Highland Street, Arlington, Virginia 22204" with copies to Edwin Meese, Chairman, Transition Team, Barry M. Goldwater, Jr. (R), U.S. House of Representatives and Jack Kemp (R), U.S. House of Representatives and to the office and staff of U.S. Senator Jesse Helms and Congressman W. E. Johnston. That said letter was duly mailed by the defendant to the above named persons and was received and read by them and others. That said letter contained false, slanderous, libelous, inflamatory and derogatory statements and allegations of and concerning the plaintiff. That the defendant knew that the statements were false and untrue and that same were made with the specific and malicious intent to harm the plaintiff in his personal life and in his profession as an attorney and counselor at law, and for the further express and malicious purpose of harming and damaging the plaintiff's application and changes [sic] to be appointed as the United States Attorney for the Middle District of

North Carolina. A copy of said letter being attached hereto and marked Plaintiff's Exhibit "A" and incorporated herein by reference.

6.

That on or about the 13th day of February, 1981, the defendant, wilfully and maliciously, and with evil and wicked intent wrote a letter addressed to "The Honorable Ronald Reagan, President of the United States, White House, Washington, D.C." with copies to Edwin Meese, Chief Counselor to the President; Barry Goldwater, Jr., Representative, California; Jesse Helms, Senator, North Carolina and William Webster, Director, F.B.I. and to the office and staff of Congressman W. E. Johnston. That said letter was duly mailed by the defendant to the above named persons and was received and read by them and others. That said letter contained false, slanderous, libelous, inflamatory and derogatory statements and allegations of and concerning the plaintiff. That the defendant knew that the statements were false and untrue and that same were made with the specific and malicious intent to harm the plaintiff in his personal life and in his profession as an attorney and counselor at law, and for the further express and malicious purpose of harming and damaging the plaintiff's application and chances to be appointed as the United States Attorney for the Middle District of North Carolina. A copy of said letter being hereto attached and marked Plaintiff's Exhibit "B" and incorporated herein by reference.

7.

That in the letters above referred to the defendant intentionally and maliciously intended to accuse and did falsely accuse the plaintiff of the following:

(a) violating the civil rights of various individuals while a Superior Court Judge;

(b) unlawfully imprisoning persons while he was a Superior Court Judge;

(c) criminal contempt;

(d) fraud and conspiracy to commit fraud, felonies;

(e) extortion or blackmail—felonies;

(f) perjury and suborination of perjury—felonies;

(g) professional misfeasance and malfeasance as a practicing attorney and as a Judge of the Superior Court of North Carolina;

(h) violations of the Code of Ethics as promulgated and adopted by the American Bar Association, the North Carolina Bar Association and the North Carolina State Bar Association;

(i) wrongfully withholding evidence from the Court in actions where he appeared as an attorney for one or more parties;

(j) violating direct orders of the Court in the trial of actions in which he appeared as an attorney for one or more litigants;

(k) violations of professional ethics and dishonesty;

(l) of being a liar and a cheat;

(m) denigrating the plaintiff's professional conduct as a Judge of the Superior Court and as a practicing attorney and as a person.

8.

That the accusations of the defendant against the plaintiff were made in reckless, wilful and wanton disregard of the rights of the plaintiff.

9.

That the defendant intentionally and maliciously caused the false and inflamatory accusations to be published to and among some of the highest governmental and political figures in the United States, and as a result plaintiff has suffered humiliation, embarrassment, anxiety and mental anguish, and said accusations as aforesaid were

calculated to and did injure the plaintiff in his personal life and in his profession as an attorney and counselor at law.

10.

That by reason of the aforesaid publications and false, inflamatory and libelous statements the plaintiff has suffered compensatory damages in the amount of Five Hundred Thousand ($500,000.00) Dollars.

11.

That by reason of the aforesaid publications and accusations made by the defendant in reckless disregard to the plaintiff's rights and without regard to the truth and with an utter lack of good faith the plaintiff is entitled to recover from the defendant punitive damages in the sum of Five Hundred Thousand ($500,000.00) Dollars.

WHEREFORE, the plaintiff demands judgment against the defendant as follows:

(1) For compensatory damages in the sum of Five Hundred Thousand ($500,000.00) Dollars;

(2) For punitive damages in the sum of Five Hundred Thousand ($500,000.00) Dollars;

(3 The defendant be required to pay a reasonable amount for plaintiff's counsel fees;

(4) That the costs of this action be taxed against the defendant and for such other and further relief as the plaintiff may be entitled in law and equity.

LATHAM, WOOD AND BALOG

By /s/ B. F. Wood
Attorneys for Plaintiff
Post Office Box 226, 8 NE Court Sq.
Graham, North Carolina 27253
Telephone 919/227-2460

PLAINTIFF'S EXHIBIT A

1274 Willowgreen Ct., Westlake Village, Ca. 91361
(213) 889-1210

COLONY APARTMENTS
2111 G South Mebane Street
Burlington, NC 27215
(919) 226-4980 (Residence)
(919) 222-2718 (Office)
December 1, 1980

The Honorable Ronald Reagan
President-Elect of the United States
901 South Highland Street
Arlington, Virginia 22204

Dear Gov. Reagan:

First, as an enthusiastic, politically active American, and staunch California Republican, let me congratulate you on your victory. Please pass on a measure of these congratulations to Bill Brock who has orchestrated the election strategy for so many of our newly elected senators and representatives. Let's hope that as each victor takes his place in government that he makes every effort to discharge his duties with fitful concern and with due regard for the faith we have placed in him. It is in regard to the latter that I write you.

I am the owner of a California corporation, Colonial Preschools & Kindergarten, Inc., that has operated three child-care centers (920 children, $500,000/year revenue) in the state of North Carolina since 1970.

During the years, we've become acquainted with the character and technical competence of Republican, David I. Smith, Attorney; Burlington, North Carolina. We hear political scuttlebutt to the effect that David I. Smith has

been chosen to be the best candidate to replace Mickey Michank, present Democratic appointee to the position of District Attorney, U.S. Middle District, Greensboro, North Carolina. A grave travesty of justice would take place in the event of Smith's being appointed to that position. We are totally opposed to his appointment.

David has had a very "colorful" career in law, commencing a few years back in Guilford County, N.C., when he was a state of North Carolina deputy district attorney. He gained an extremely unsavory reputation with both the court and his peers. To this day he is known as "Mad Dog" Smith because of his obstreperous conduct in the pursuit of his duties. A person well-acquainted with this aspect of Smith's conduct is James E. Pell, Esq.; Pell, Pell, Weston & John, 220 Commerce Place, Greensboro, N.C.; phone (919)379-9416.

At a hearing on November 28, 1978, in the Middle District, N.C., presided over by the Honorable Herman Amasa Smith, U.S. Magistrate, re case 11 C-79-520, David I. Smith's conduct was stated to be "the most reprehensible conduct of any attorney to come before me in my 25 years on the bench." Present at that hearing was Michael J. Lewis, Esq.; 285 Executive Park Boulevard, Winston Salem, N.C. 27103; phone (919)765-8155.

Following his terms as Deputy District Attorney in Guilford County, Smith came to Alamance County, Burlington, N.C., and set up a private law practice. He concentrated largely on divorces and "D.U.I.'s". We have three witnesses to the "fixing of a D.U.I. charge filed against Carl R. Staley, 1616 Greenwood Terrace, Burlington, N.C., for a cash payment of $350.000. Thereafter, Staley while driving intoxicated, had a near fatal auto accident that has left him with a permanent leg disability.

Since this geographical area is now, and has been, nearly 100% Democratic, a Republican attorney is a rarity.

You may recall that for the first time in the history of North Carolina, a few years ago, they elected a Republican Governor, Jim Hulshauser. He appointed David I. Smith a temporary Superior Court Judge. In that position, Smith showed the tremendous lack of regard he has for the law, the civil rights of individuals, and our system of justice in general.

Two particular incidents involving the unlawful imprisonment of individuals are noteworthy. The individuals involved were: G.E. Roury, M.D., 1821 Hilton Road, Burlington, N.C.; phone (919) 226-9300; and Sidney Verbal, Esq.; 901 Elizabeth Avenue, Charlotte, N.C.; phone (704) 332-5044. Both incidents occurred during the temporary Superior Court term of David I. Smith and were the result of his direct act.

You will find a newspaper clipping from the Alamance News which indicates the circumstances of the summary imprisonment of Dr. G.E. Koury without resort to the subpoena power. It indicates a callous disregard for the doctor's office full of patients and his patients then in the Cardiac Care Unit at Memorial Hospital. It is unthinkable but it happened. The civil rights of both the doctor and patients were violated, and the doctor's exposure to liability was tremendous. David I. Smith must never again be permitted to achieve a dominant position in our system of justice!

In the matter of black attorney, Sidney Verbal, Esq., an equally vile action took place. David I. Smith was presiding over a case in Charlotte, N.C. and Sidney Verbal was representing one of the litigants. Verbal arrived at the hearing some 18 minutes late, was permitted no explanations, was found guilty of contempt, and summarily imprisoned in the Mecklenberg County Jail. Verbal appealed the matter in the North Carolina Circuit Court of Appeals, and the decision was reversed. A report on that case is enclosed. Once again, David I. Smith

demonstrated a total lack of regard for the civil rights of both private individuals and officers of the Court. We must be certain that such callous, obstreperous acts are never permitted to occur again as a result of David I. Smith being a judge or prosecutor.

At this time, incidents occurring in the litigation of C-75-520 in the U.S. District Court, Middle District, Greensboro, N.C., have been referred to the Honorable Benjamin H. White, Jr.; Assistant U.S. District Attorney; P.O. Box 1858, Greensboro, N.C. 27402. Our corporation alleges criminal contempt by David I. Smith in that when he was attorney for the plaintiff in the above-noted case, he did, in fact, wilfully withhold crucial evidence then in his possession that had been ordered to be produced by the court. Further, we allege conspiracy to fraud in that Smith names as a key witness to a claim of slander, wife of co-counsel, John Patterson. Smith, according to the sworn testimony of the witness, never discussed the matter with the named witnesses (Anne Patterson) nor had the witness ever met the accused defendant.

The attorneys sought some $650,000 in damages and took the case on a contingency fee basis. Defendants, early in the case, refused to pay blackmail solicited by David I. Smith, and thereafter the crucial evidence was withheld. The corporate costs for legal fees and expenses exceeded $75,000 and, of course, there could be no recovery through an action alleging malicious prosecution since no such abuse of action is recognized in North Carolina. Had the crucial evidence been produced when ordered, the expense would have been about $8,000.

Prior to filing the suit, attorney for plaintiff, according to sworn testimony, stated that they "had enough on defendant R. McDonald to put him in Atlanta for life." Thereafter, throughout discovery, plaintiff's attorney never dwelt upon matters purporting to support their

client's "good faith" claims, but instead persistently interrogated in areas of defendant's alleged wrong-doing even though prohibited from doing so by a direct order of the court.

There were in excess of 70 instances of false swearing and perjury by plaintiff during discovery and the complaint was ultimately dismissed on a motion for summary judgment granted by the Honorable Eugene A. Gordon, Judge, U.S. Middle District. In dismissing the complaint, Judge Gordon stated that the case "was brought without merit and pursued in a dilatory manner causing vexation to both the defendants and the court." Additionally, he fined plaintiff $1000 for failure to respond to discovery orders and commented that "for the most part, plaintiff's testimony was evasive, incomplete, and in some instances, untruthful."

The corporation is pursuing criminal indictment of both the attorneys and client.

In the meantime, largely as a result of our efforts, David I. Smith has not been re-appointed as a Superior Court judge by Governor Jim Hunt. Smith has returned to Burlington to pursue his D.U.I. practice. He's the only attorney advertising for business in the classified section these days. I've enclosed a copy of his latest ad.

Governor, I hope you will see fit to review these facts and weigh them as part of the decision-making process as you choose a candidate for U.S. District Attorney, Middle District. We are greatly opposed to the appointment of David I. Smith and would be willing to appear at any hearing related to the selection process. Dr. Koury, Sidney Verbal, and I want to help you resist the political pressure that might bring about this impending travesty of justice. None of us want any Watergate-type attorneys in powerful places this time.

Good luck. We're all for you.

Sincerely,

Robert McDonald /s/
ROBERT MCDONALD

cc. Edwin Meese, Chairman, Transition Team
Barry M. Goldwater, Jr., (R) U.S. House of Representatives
Jack Kemp, (R) U.S. House of Representatives

abw

PLAINTIFF'S EXHIBIT B

COLONY APARTMENTS
2111 G South Mebane Street
Burlington, NC 27215
(919) 226-4980 (Residence)
(919) 222-2718 (Office)
February 13, 1981

1274 Willowgreen Ct., Westlake Village, Ca. 91361
(213) 889-1210

The Honorable Ronald Reagan
President of the United States
White House
Washington, D.C.

Dear Mr. President:

In recent letters I have expressed continued concern regarding the candidacy of David I. Smith; Burlington, N.C., attorney, for the position of U.S. Attorney, Middle District, Greensboro, N.C. I am opposed to Smith on the basis of his failure to demonstrate the proper technical competence, respect for our system of justice, respect for the civil rights of citizens, or to possess an acceptable level of ethics, basic honesty or common sense.

Sometimes a measure of a man's qualification is the reputation he generates among his peers. An indication of Smith's reputation may be found in the attached newspaper article, "Almance Bar Association Endorses Smith for U.S. Attorney".

In essence, the Bar Association, which consists of 102 attornies, by a vote of less than two dozen, endorsed Smith's candidacy. According to Burlington Attorney Tip Messick, the orchestration of the vote was quite typical, an 11th hour vote on a subject not on the agenda,

at a time when nearly all the opposition had left the meeting. The vote tally was 20:1 "for", with four abstentions. We feel that it is equally interesting to find that the newspaper article was published a week after the meeting took place.

There are three attornies in Almance County who can speak of David I. Smith's character:

Les Burke—Vernon, Vernon, and Wooten
522 South Lexington Avenue
Burlington, NC 27215
(919) 227-8851

Mr. Burke verifies that Smith is a liar.

Tip Messick—Messick, Messick, and Messick
Wachovia Building
Burlington, NC 27215
(919) 226-2436

Mr. Messick verifies unethical conduct by Smith and had filed a grievance with the North Carolina State Bar, Raleigh, N.C., in 1980.

Mitchell McIntire
103 West Elm Street
Graham, NC
(919) 228-1341

Mr. McIntire verifies that David Smith has been dishonest in a matter involving false representation of the filing of an "upset" bid in a property settlement case.

The court record in U.S. Middle District # C75-52G is replete with false statements by David Smith. You are referred to a "Motion to Continue", wherein he alleged hardship due to the fact that he was in solo practice and had to attend a conference in Houston. In fact Smith

had a partner, co-counsel John B. Patterson, who also signed the complaint. The fact that Patterson continued as counsel of record for 15 months after Smith was dismissed stands as mute evidence of Smith's lie. Additionally on the record, 12/30/75, Deposition of C. S. Richardson, Smith stated that C. S. R. had presented him with discovery per the court order of the same date, stated it was at his office, and that he would present it to counsel for defendant without further subpoena. It was never presented and delayed proceedings nearly 1½ years beyond Smith's dismissal.

The above conduct was in part that which U.S. Magistrate Herman Amassa Smith referred (11/28/78) to as "the most reprehensible conduct of any attorney appearing before me in his 25 years on the bench".

Without a doubt, David I. Smith has demonstrated that he is contemptible, a liar, and basically dishonest.

Dishonesty is so rife in our government today that the Department of Justice has had to resort to Abscam to smoke it out and prosecute it. The recent case of ex-judge Rep. R. Kelley (R) of Florida is a case in point. We do not need any more dishonest ex-judges to muddy the waters of the magnificent recovery we have achieved since Watergate.

Mr. President, I trust that you will have appropriate staff members review this problem with Senator Jesse Helms so as to avoid embarrassment to us all.

Respectfully,

/s/ Robert McDonald
ROBERT MCDONALD

cc: Edwin Meese, Chief Counselor to the President
Barry Goldwater, Jr., Representative, California
Jesse Helms, Senator, North Carolina
William Webster, Director, F.B.I.

OPINION OF THE DISTRICT COURT
(April 28, 1983)

The opinion of the District Court for the Middle District of North Carolina is reported at 562 F. Supp. 829 (M.D.N.C. 1983), and is reprinted in the Appendix to the Petition For A Writ of Certiorari at 7a-30a.

OPINION OF THE FOURTH CIRCUIT
(July 28, 1983)

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 737 F.2d 427 (4th Cir. 1984), and is reprinted in the Appendix to the Petition for a Writ of Certiorari at 1a-6a.

JUDGMENT OF THE FOURTH CIRCUIT
(June 28, 1984)

The judgment of the United States Court of Appeals for the Fourth Circuit is reprinted in the Appendix to the Petition for a Writ of Certiorari at 31a.

No. 84-476 (4)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ROBERT MCDONALD,
Petitioner,

v.

DAVID I. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER

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Dated: Washington, D.C.
January 24, 1985

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QUESTIONS PRESENTED

1. Does the petition clause of the First Amendment provide absolute immunity from a common law action for libel when:

(a) the allegedly defamatory statements are relevant to the qualifications of the plaintiff, a candidate voluntarily seeking presidential nomination and appointment to a high federal office; and

(b) the statements are contained in private letters from an individual citizen to the President, with copies to a limited number of federal representatives and officials who had authority to take responsive action?

2. In these circumstances, if the petition clause does not provide absolute immunity, does it at least require increased protections, including judicial discretion to award costs and legal fees to an uninsured defendant if he prevails?

LIST OF PARTIES

The caption contains the names of all parties.

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TABLE OF AUTHORITIES—Continued

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (Cert. Pet. App. 1a-6a) is reported at 737 F.2d 427 (4th Cir. 1984). The opinion of the District Court for the Middle District of North Carolina (Cert. Pet. App. 7a-30a), is reported at 562 F. Supp. 829 (M.D.N.C. 1983).

JURISDICTION

The judgment of the Fourth Circuit was entered on June 28, 1984 (Cert. Pet. App. 31a). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1). Certiorari was granted November 26, 1984.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Respondent David I. Smith, an unsuccessful candidate for the office of U.S. Attorney for the Middle District of North Carolina, filed a common law libel action against petitioner Robert McDonald, seeking one million dollars in compensatory and punitive damages because of allegedly libelous statements, made during respondent's campaign, that directly concerned his qualifications for that office.[1] The statements were contained in two pri-

[1] It is undisputed that respondent was a candidate, and a public official or public figure. The complaint concedes that respondent "made application for" the position of U.S. Attorney. JA 4. The exhibits to the complaint, which were incorporated by reference as allegations of the complaint (JA 5), show that respondent had been a state court judge and had held other public offices. JA 9. In the District Court, respondent's attorney conceded that respondent was

vate letters from petitioner to President Reagan. JA 8-16. Copies allegedly were mailed to Senator Jesse Helms and Representative W. E. Johnston, who sat on the candidate "screening committee," [2] and to four other federal officials in the executive and legislative branches.[3] Respondent does not allege that the statements were communicated to the public or the press.

Although the complaint does not dispute the truth of many of the statements contained in petitioner's letters, it does allege that both letters contained false and defamatory statements which injured respondent's reputation and damaged his chances of appointment. It further alleges, although only in conclusory terms, that petitioner "knew that the statements were false and untrue" and acted out of malice towards respondent.[4] J.A. 4, 5.

"a public figure." Transcript of Oral Argument on February 4, 1983, at 31.

[2] Petitioner's February 13, 1981 letter to the President referred to and enclosed an article from the *Burlington Times News* of February 5, 1981 titled "Alamance Bar Association Endorses Smith For U.S. Attorney." JA 14. The article reported that Rep. Johnston "had formally recommended Smith for the post in a letter to Senator Jesse Helms, the senior senator on the screening committee," and that "Smith and Johnston are former law partners, and Johnston sits on the screening committee . . . ."

[3] The complaint alleges that the first letter, dated December 1, 1980, was also mailed to Rep. Barry M. Goldwater, Jr., of California; Rep. Jack Kemp; and Edwin Meese, as Chairman of the Transition Team and as Chief Counselor to the President. JA 4, 16. The complaint alleges that the second letter, dated February 13, 1981, was also mailed to Rep. Goldwater; Edwin Meese; and William Webster, Director of the F.B.I. JA 5. Edwin Meese was directly responsible to the President for evaluating potential presidential appointments. William Webster was authorized by statute to investigate the backgrounds of candidates for high federal office, including the office of U.S. Attorney. See n. 74, *infra*.

[4] Petitioner's answer denied that the statements were false or that petitioner knew they were false. Answer ¶¶ 12, 18. Respondent does not specifically allege that the letters were written "with reckless disregard" for the truth, perhaps because the letters provided, on their face, a ready means for evaluating the truth of most of the

In the first letter, petitioner requested an opportunity "to appear at any hearing related to the selection process" in order to testify publicly about respondent's qualifications. JA 12. Both letters strongly criticized respondent's conduct as a public official and as an officer of the court. For example, the first letter stated that as a state court judge, respondent "showed the tremendous lack of regard he has for the law, the civil rights of individuals, and our system of justice in general." JA 10. As an illustration, petitioner stated that respondent had "summarily imprisoned" a black attorney:

> "In the matter of black attorney, Sidney Verbal, Esq., an equally vile action took place. David I. Smith was presiding over a case in Charlotte, N.C. and Sidney Verbal was representing one of the litigants. Verbal arrived at the hearing some 18 minutes late, was permitted no explanations, was found guilty of contempt, and summarily imprisoned in the Mecklenberg County jail. Verbal appealed the matter in the North Carolina Circuit Court of Appeals, and the decision was reversed. A report on that case is enclosed." JA 10.[5]

This letter also stated that petitioner had been personally aggrieved by respondent's abuse of his authority as an officer of the court. After noting (these facts are not disputed) that respondent had represented, on "a con-

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statements contained therein by supplying names, addresses, and telephone numbers of persons present at the time, and citations to court records and newspapers articles.

[5] Respondent claims these statements were knowingly false and defamatory. JA 5-6. The case report petitioner enclosed is reported, *State of North Carolina v. Sidney Verbal II*, 41 N.C. App. 306, 254 S.E.2d 794 (1979). The appellate court found that Verbal had been "sentenced [by respondent] after a summary proceeding to two days' imprisonment for being eighteen (18) minutes late in returning to Court after a luncheon recess . . . ." 254 S.E.2d at 795. Citing a N.C. statute which required "a summary opportunity to respond," and finding that "[n]othing in the record before us indicates that the alleged contemnor was given any opportunity to be heard," the appellate court reversed respondent's order of imprisonment. *Ibid.*

tingency fee basis," a client who sued petitioner for substantial damages on "a claim of slander," the letter stated that "when he was attorney for the plaintiff" in that case, respondent "did, in fact, wilfully withhold crucial evidence then in his possession that had been ordered to be produced by the court." JA 11. It stated further that the federal court had ultimately dismissed that complaint, finding it "was brought without merit and pursued in a dilatory manner causing vexation to both [petitioner] and the court," and fining respondent's client "$1000 for failure to respond to discovery orders . . . ."[6] JA 11-12. And it noted that the "costs for

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[6] Respondent claims these statements were knowingly false and defamatory. JA 5-6. The files of the U.S. District Court, M.D. N.C., Greensboro Div., regarding *Richardson v. Colonial Pre-Schools & Kindergartens, Inc., Robert McDonald and Wife, Lulu McDonald,* No. C-75-52-G, show that until July 9, 1976, respondent did represent the plaintiff in that action against petitioner. Magistrate Herman Amasa Smith found that "the record taken as a whole suggests an action brought without basis and pursued in an unorthodox and dilatory manner, burdening not only the defendants but the court." He ordered plaintiff to pay defendants $1,000 as a sanction for the costs and fees "incurred in connection with obtaining and attempting to enforce the court's orders with respect to discovery." *See* Magistrate's Memorandum and Recommendation filed June 3, 1977 at 12. Earlier, in a Magistrate's Memorandum and Recommendation filed January 6, 1977, the Magistrate noted that his December 30, 1975 Order directing plaintiff to produce her income tax returns had been issued only "after another admonition to counsel for the plaintiff," and had still not been obeyed. *Id.* at 2. He referred to yet another discovery order, issued September 2, 1975, and noted that "in spite of that warning, counsel for the plaintiff has failed also to comply with that order." *Ibid.* With respect to the slander count of the complaint, the Magistrate concluded that "[a]fter extensive discovery, evidence produced by plaintiff is insufficient to support allegations of actionable slander of the plaintiff by the defendant Robert McDonald," and concluded further that "there is no evidence of any actual malice or bad faith on the part of the defendant Robert McDonald with respect to such statements. Further, the evidence appears to support a good faith belief by the defendant McDonald in the truth of the statements attributed to him." *Id.* at 6-7. On the Magistrate's recommendation, the court granted McDonald summary judgment on plaintiff's slander claim.

legal fees and expenses" for defending that action "exceeded $75,000," and that petitioner could not recover those costs, even though he had prevailed. JA 11. Petitioner was thus personally aware that even a successful defense to a defamation action can cost a defendant thousands of dollars.

The letter also stated that prior to filing that earlier action, respondent had said he "had enough on defendant R. McDonald to put him in Atlanta for life." JA 11. Petitioner was obviously concerned that a lawyer who had threatened to put him in prison for life might acquire the federal prosecutorial authority to pursue that threat.

Thus, because he was personally aggrieved and concerned, and also because he was a "politically active American, and staunch California Republican," JA 8, who did not "want any Watergate-type attorneys in powerful places this time," JA 12, petitioner wrote his President to urge that respondent not be appointed.

The complaint was filed in state court in North Carolina. Petitioner removed the case to the United States District Court for the Middle District of North Carolina on grounds of diversity of citizenship. He moved for judgment on the pleadings on the ground that the petition clause of the First Amendment provides absolute immunity from common law libel actions. Petitioner also argued that even if private communications from a citizen to his President are not absolutely immune from such actions, citizens sued as the result of such communications are entitled to special protections, including judicial discretion to award costs and legal defense fees should they ultimately prevail.

The District Court agreed with petitioner that the First Amendment right to petition is applicable to the states and imposes limits on the state's power to vindicate reputation through its common law of defamation. It also agreed that

> "decisions interpreting the 'speech' clause of the first amendment do not necessarily control cases concern-

> ing the 'petition' clause. For, as Chief Justice Marshall once stated, '[i]t cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.'" 562 F. Supp. at 836; Cert. Pet. App. 17a.

The District Court held that petitioner's allegedly defamatory communications fell "within the general protection afforded by the petition clause," 562 F. Supp. at 838-39; Cert. Pet. App. 21a, but concluded that the petition clause does not provide absolute immunity from common law libel actions. Instead, relying on this Court's 1845 decision in *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), the District Court held that the petition clause provides only a qualified privilege. 562 F. Supp. at 840; Cert. Pet. App. 23a. Petitioner appealed to the Fourth Circuit, which affirmed, also relying on *White v. Nicholls*. 737 F.2d at 429; Cert. Pet. App. 3a.

SUMMARY OF ARGUMENT

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court ruled that the speech and press clauses of the First Amendment afford qualified immunity, but not absolute immunity, from common law libel suits brought by public officials. This case, however, arises under the petition clause. It presents the Court with its first opportunity to consider whether a private petition from a citizen to his President, which serves a unique self-governmental function, requires greater immunity from common law libel suits than does a newspaper's speech to the public. Deciding whether the state's interest in protecting individual reputation is sufficient justification for abridgment of the substantial federal interests protected by the petition clause is made considerably easier in the circumstances of this case because of the very narrow rule sought by petitioner.

First, petitioner does not ask this Court to rule that the petition clause provides absolute immunity from common law libel actions for every statement he might make

in a petition to the federal government. The undisputed facts of this case show that all of the allegedly defamatory statements "touched on" and were relevant to how respondent would exercise the governmental power sought by him, and were contained in a private petition to federal officials who had authority to take responsive actions.[7]

Second, the Court need not decide whether a private petition would be absolutely immune from a federal criminal action for providing false information to the government.[8] Petitioner claims immunity only from common law libel actions.

Unlike the more general freedoms of speech and press, the right to petition was understood by the Framers of the Constitution and the First Amendment to be a necessary right of a self-governing people. When the First Amendment was adopted, the right to petition already

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[7] Thus, in order to resolve this case, this Court need not rule that the communication of knowingly false information about irrelevant details of a public official's private life, or the communication of knowingly false information to the general public, or to officials who are not even arguably in a position to take responsive action, is absolutely immune from common law libel actions.

[8] As this Court has recognized, in several respects a criminal prosecution for providing false information to the government would be less likely to deter protected speech than would a common law libel action. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) ("[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.") Unlike criminal actions, where the government is presumably disinterested and does not seek financial gain, common law actions are brought by "self-perceived victims" who do seek financial gain. *Herbert v. Lando*, 441 U.S. 153, 204 (1979) (Marshall, J., dissenting). Not infrequently, such common law actions claim huge damages and engage in probing pre-trial discovery for the *"in terrorem"* purpose of forcing an early and lucrative settlement. *Ibid.* In addition, criminal actions would at least provide the "ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt." *Sullivan*, 376 U.S. at 277. And if indigent, a criminal defendant would be afforded free counsel.

had a rich and ancient history, and a well understood governmental function. In that history, the right to petition had been linked with a rule of absolute immunity for petitioners. That common law rule, well established in England and colonial America, was confirmed in *Harris v. Huntington*, 2 Tyler 129 (Vt. 1802), the earliest American case to consider the issue.

The Framers designed a limited government, in which each branch would check and balance the others, and in which the people, as the ultimate sovereign, would check and balance all of the organized institutions of government. They understood that the checking balance between the people and their government requires a right to petition with immunity, and that governmental limitations on the right to petition would threaten that balance and would intrude upon the fundamental concept of popular self-government.

The right to petition serves this self-governmental function by providing citizens a means of direct, unmediated access to governmental decision-makers. It enables citizens to inform government of facts or political opinions necessary for a responsive and responsible system of representative government, and also to check abuses of governmental power by criticizing governmental plans or actions. Both the informing and critical functions of petitioning would be severely undermined without a rule of absolute immunity.

Because petitioning, unlike speech, is a direct exercise of a self-governmental function, it is entitled to the same rule of absolute immunity from state common law libel actions that is afforded governmental functions performed by members of the executive, legislative and judicial branches. For ordinary citizens, even more than for federal officials, the ruinous prospect of having to spend literally thousands of dollars in unrecoverable costs and fees to defend against a conclusory allegation, easily made, that the information they communicated to government was "knowingly false," would so chill exercise of their right to petition as to be the functional equivalent

of a prior restraint. Furthermore, because the right to petition the national government concerning the qualifications of an individual actively seeking appointment to a high national office is an essential element of national governance, such petitions cannot be subject to any state restriction whatsoever.

Even if balancing of federal and state interests is deemed appropriate, in the circumstances of this case, the state's attenuated interest in protecting the reputation of a candidate for high federal office is not sufficiently compelling to justify the restraint on would-be petitioners caused by the prospect of having to defend against a common law libel action. The federal interests are particularly strong in this case, where anything less than absolute immunity would necessarily subject the President and other high federal officials—the sole recipients of the letters—to burdensome and probing depositions in order to determine whether respondent was, in fact, defamed or injured.

Finally, if the state interest justifies some restraint, the Court should fashion procedures that will minimize the restraint as much as possible.

ARGUMENT

I. GIVEN THE FRAMERS' UNDERSTANDING OF THE ABSOLUTE NATURE OF THE COMMON LAW RIGHT TO PETITION THE KING AND PARLIAMENT, AND THEIR CLEAR INTENTION TO AFFORD AMERICAN CITIZENS EVEN GREATER RIGHTS TO PARTICIPATE IN SELF-GOVERNMENT THAN HAD BEEN ENJOYED BY BRITISH AND COLONIAL SUBJECTS, THE PETITION CLAUSE MUST BE INTERPRETED TO PROVIDE ABSOLUTE IMMUNITY WHEN A PRIVATE CITIZEN PETITIONS HIS PRESIDENT.[9]

When the petition clause was drafted, the "right of the people" to "petition the Government" for redress of

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[9] Decisions of this Court concerning the scope of immunity "from civil damages liability have been guided by the Constitution, federal

grievances was far older and more clearly established than, and functionally quite different from, the more general freedoms of speech and press.[10] The Framers understood that freedom of speech and press were relatively new ideals, relating directly to the character of the new American society they intended to create, but only indirectly to government *per se*. They also understood, however, that throughout its long history, petitioning had served the special function of providing a direct means of popular participation in self-government. Both the English and colonial common law contemporaneous with adoption of the petition clause recognized the special function of petitioning and afforded petitioners absolute immunity from libel actions. Thus, under the common law known to the Framers, this case would have been governed by a rule of absolute immunity. Certainly the Framers did not intend in the petition clause to narrow the protections historically attached to the right to petition.

Although this Court has had frequent occasions to interpret the speech clause, it has not had similar occasion to examine the history and meaning of the petition clause.[11] Resolution of this case, however, requires such

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statutes, and history." *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1982). History includes "common law." *Ibid.* Absent explicit constitutional or statutory direction, the Court "also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government." *Id.* at 747-48. Because there are no relevant federal statutes, the decision in this case must be guided by common law and constitutional history, and by the public policy concerns implicit in the constitutional structure of our government.

[10] Petitioning is described as "the right" of "the people." Freedom of speech is described only as a limit on Congress' lawmaking authority. The concept of a "right" existing in the "people" apart from, and prior to, the constitution of a government is a critical feature of any interpretation of the petition clause. *See* Pierce, *Maryland's Summary Judgment Procedure in New York Times Defamation Cases*, 40 *Md. L. Rev.* 638, 664 (1981).

[11] In *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967), *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937),

an examination. That examination will show that petitioning functions as, and was understood to be, a direct embodiment of popular sovereignty, intended as a check on the formal institutions of government. Governmental limitations on the right to petition are therefore direct intrusions upon popular self-government.

A. The Ancient Right To Petition Is The Historical Basis For Most Of The Constitutional Institutions Of Self-Government, And Is Directly Linked To The Concept Of Immunity.

The right to petition and the concept of immunity share a common history in Parliament's struggle to assert against the King its claim to be the embodiment of the popular will and the ultimate law-making authority. A petition is a complaint to and often about government; without immunity, the petitioner could be charged with seditious libel. For that reason, development of the right to petition was inseparably linked to development of immunity for both public petitioners—members of Parliament—and private petitioners.

1. *The British tradition of petition/immunity.*

The right to petition, which was the common root of both the legislative bill and the judicial complaint, was first formally expressed in the Magna Carta of 1215, in which King John promised

> "that if we, our justiciar, or our bailiffs or any of our officers, shall in anything be at fault toward anyone, or shall have broken any one of the articles of the peace or of this security, and the offence be

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and *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 552 (1876), brief mention was made of the right to petition, but no detailed interpretation was presented. More recently, the Court has had occasion to consider the significance of the right to petition in the context of interpreting the reach of federal antitrust statutes. *See California Motor Transport v. Trucking Limited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961).

> notified to four barons of the five-and-twenty, the said barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, *petition to have the transgression redressed* without delay." [12]

From this right to petition emerged the parliamentary privilege of initiating legislation, or "bills." "The words petition and bill were used interchangeably in legal and common language down to Tudor Times." [13] From the right to petition also emerged the judicial complaint. Indeed, "parliament was a court of a very special kind," and the "one constant attribute of parliament, so far as our evidence goes, was, for the better part of a century, the hearing of private petitions, petitions which in most instances asked for justice." *H. Richardson and G. Sayles, The English Parliament in the Middle Ages*, ch. XXVI, pp. 41, 43 (1981).

Until the fifteenth century, legislative petitioning was tied to parliamentary satisfaction of the King's financial needs. The King called assemblies of Parliament to meet those needs, but Parliament conditioned appropriations on the granting of its petitions. In 1414, however, Parliament asserted itself as the sole source of legislative authority: the House of Commons declared itself "as well

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[12] McKechnie, *Magna Carta* 467 (2d ed. 1914) (emphasis added). The next line shows the early link between the right to petition and the concept of self-governance, and shows that petitions were not mere requests for royal favor; the King and the Barons both expected that petitions would be honored:

> "And if we shall not have corrected the transgression . . . within forty days . . . the four barons aforesaid shall refer that matter to the rest of the five-and-twenty barons, and those five-and-twenty barons shall, together with the community of the whole land, distrain and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit . . . and when redress has been obtained, they shall resume their old relations towards us. *Ibid.*

[13] Smellie, *Right of Petition*, 12 *Encyclopedia of Social Sciences* 98 (1934).

assentires as petitioners;" the King responded in the following terms:

> "The King of his grace especial granteth that fro hens forth no tyhng be enacted to the Petitions of his Commune, that be contrarie of hir askyng, wherby they shuld be bounde withoute their assent." [14]

By the fifteenth century, then, through the device of the petition, Parliament had achieved the sovereign authority to initiate and enact legislation.

Absolute Parliamentary immunity from judicial and executive retaliation for petitioning/legislative activities developed simultaneously with the right itself. Immunity from executive inquiry was first formally expressed in 1399;[15] immunity from judicial inquiry in 1512.[16] By 1541 immunity for members of Parliament was asserted as one of the "ancient and undoubted rights and privileges" by the Speaker of the House of Commons at the commencement of each session of Parliament.[17]

For the next hundred years, however, there were periodic violations of parliamentary immunity, followed always by vigorous protests by Commons. The final violation occurred in 1629 in a judgment by the King's

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[14] *See* Smellie, *supra* n. 13, at 98; *see also Adams & Stephens, Select Documents of English Constitutional History* 181-82 (1916).

[15] In 1397, Sir Thomas Henry was condemned by Richard II for introducing a bill to reduce the expenses of the royal household. In 1399, in response to petitions filed by both Henry and the House of Commons, Richard II's successor reversed and annulled the condemnation as against parliamentary rights. *See* Veeder, *Absolute Immunity In Defamation: Legislative and Executive Proceedings*, 10 *Colum. L.J.* 131, 132 n. 4 (1910).

[16] In that year an Act was passed condemning as void all legal proceedings against members "for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament, to be communed or treated of." 4 Hen. VIII, ch. 8; cited in Veeder, *supra* n. 15, at 132.

[17] Veeder, *supra* n. 15 at 132.

Bench against nine members.[18] That judgment was formally reversed by the House of Lords in 1667.[19] In the Bill of Rights of 1689, Parliament definitively declared "[t]hat the Freedom of Speech, and Debates as Proceedings in Parliament, ought not to be impeached or questioned in any court or place out of parliament." 1 W. & M. Sess. 2, c. 2.

As the parliamentary petition evolved into the contemporary legislative bill, there developed a simultaneous and related tradition of direct private petitioning to the King. These private petitions involved grievances requiring both judicial and legislative solutions. Although many of the former were referred to the courts—the predecessor to the modern complaint—the latter were caught in the competition between King and Commons. By the fourteenth century, "the House of Commons attempted to secure that all petitions involving a change of law should be determined by themselves." [20] This was the source of the private bill.

Following the pattern of parliamentary petitioning, private petitioning was linked to a formal concept of absolute immunity in the latter part of the seventeenth century. In 1669 Commons resolved:

> "That it is an inherent right of every commoner of England to prepare and present Petitions to the house of Commons in case of grievances . . . . That it is the undoubted right and privilege of the Commons to judge and determine concerning the nature and matter of such Petitions . . . .
>
> *That no court whatsoever hath power to judge or censure any Petition presented to the house of Commons,* and received by them, unless transmitted from thence . . . ." [21]

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[18] Veeder, *supra* n. 15 at 133.

[19] Veeder, *supra* n. 15 at 134.

[20] Smellie, *supra* n. 13, at 98.

[21] 4 Parl. Deb. (1st ser. Cobbett) 432-33 (1669) (emphasis added), *quoted in* Fellman, *Constitutional Rights of Association,* 1961 *Sup. Ct. Rev.* 74 at 79.

This principle was given formal judicial recognition in *Lake v. King*, 1 Saund. 131 (1680), in which a libel action had been founded on a petition presented to a committee of Parliament, accusing the vicar general of using his office for extortion. The court held that a libel action could not be based upon a petition to a committee of Parliament that had power to redress the grievance: "The exhibiting of the petition to the committee of parliament was lawful, and no action lies for it, *although the matter contained in the petition was false and scandalous* because it is in a summary course of justice, and before those who have power to examine whether it be true or false." *Lake v. King*, *supra* at 139 (emphasis added).

Although Commons and the courts had established a rule of absolute immunity which protected the people's right to petition Parliament, no similar immunity protected the people's right to petition the King until after the *Seven Bishops* case of 1688, *State Trials* XII, 183. In that case, the Bishops were tried for seditious libel after petitioning the King to protest a royal proclamation. Despite a judge's instruction that "no man can take upon him to write against the actual exercise of the government, unless he have leave from the government, but he makes a libel, be what he writes true or false," the jury acquitted the Bishops.[22] The immunity conferred by the jury was given formal recognition the next year in the Bill of Rights: "[I]t is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal." [23]

English history demonstrates that the right to petition was the source of most of the institutions of constitutional self-government, including public legislation by a representative body, initiation of judicial proceedings, private bills, and the concept of immunity, both for individuals and for representatives. The American colonists were

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[22] State Trials XII, pp. 183, 427.

[23] Smellie, *supra* n. 13, at 99.

well aware of the dangers of petitioning without immunity.[24] They also understood the close tie between the right to petition and the concept of popular sovereignty. This entire complex of ideas was carried over into American institutions and theories of government.

2. *The Colonial tradition of petition/immunity.*

The right to petition with immunity was recognized in the American colonies as both a common law right of all British subjects and a "natural right" inherent in republican government. The former concept was expressed in numerous revolutionary declarations. Thus, in its Declaration of Rights and Grievances, the Stamp Act Congress of 1765 stated "[t]hat it is the right of the British subjects in these colonies to petition the King or either House of Parliament." [25] The Declaration and Resolves of the First Continental Congress (1774) expressly stated "[t]hat they [the colonists] have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." [26]

The natural right concept of the right to petition was effective within the colonial systems of government themselves. For example, the Massachusetts Body of Liberties of 1641 declared that

> "[e]very man, whether Inhabitant or forreiner, free or not free, shall have libertie to come to any publique Court, Councel or Towne meeting, and either

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[24] A vivid example occurred in 1768 when the Massachusetts Assembly petitioned the King to protest the Townshend Acts. In response, the British Secretary of State for the colonies demanded that the Assembly rescind its petition. When it refused, he dissolved the Assembly. *See R. Perry and J. Cooper, Sources of Our Liberties* 280 (1959).

[25] 1 *B. Schwartz, The Bill of Rights—A Documentary History* 198 (1971).

[26] *Id.* at 217.

> by speech or writeing to move any lawfull, seasonable and material question, or present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner." [27]

This example reflects what was clear in both England and America: petitioning offered a means of access to and participation in government far broader than the limited reach of contemporary suffrage.[28] This was of particular importance in the American colonies' relationship to Parliament. Because the colonies had no representatives, they relied extensively on petitions,[29] which were vigorously defended as a means of participation in government broader than suffrage or representation per se.[30]

The colonial assemblies received so many petitions that they had to establish methods for responding to them. Petitions directly from the people were labelled "griev-

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[27] *Id.* at 73.

[28] That this continued to be the case even after adoption of the Constitution is vividly demonstrated by the petition received from the Cherokee Indians protesting their forced removal from Georgia to Oklahoma, see M. Wardell, *A Political History of the Cherokee Nation* 364-65 (1938), and from freed slaves protesting the fugitive slave laws, see 6 Annals of Congress 16-18 (January 30, 1797) (remarks of Rep. Swanwick of Pennsylvania).

[29] For example, Rhode Island petitioned Parliament to protest the Molasses Act of 1733. In response to the Stamp Act (1765), Virginia, New York, and Rhode Island all submitted petitions to Parliament and/or the King. In 1768, Massachusetts petitioned the King to protest the Townshend Act. *D. Smith, The Right To Petition For Redress of Grievances: Constitutional Development And Interpretations* 56-63 (University Microfilms) (unpublished thesis).

[30] *See, e.g.*, the remarks of Sir John Bernard speaking in Parliament in support of a petition from Rhode Island protesting the Molasses Act of 1733, noting that except for petitions, the colonists "have no other way" of protecting their interests. IV *E. B. Greene, The American Nation: A History* 186 (1905), *citing* Corbett, *Parliamentary History*, Vol. VIII, pp. 1261-66.

ances," and were often directed to a "committee of grievances." [31] Once received by the Assembly, grievances could result in legislation, in adjudicative proceedings, or in direct petitions by the Assembly to the King. Because no strict distinction was drawn between the legislative and judicial functions of the colonial Assembly, grievances against government officials could result in judicial proceedings before the Assembly. Witnesses in such proceedings, including the individuals who had filed the grievance, were afforded immunity.[32] This immunity was the American source of what later became the immunity afforded participants in judicial and legislative proceedings.

By the time of the Revolution, the right to petition was central to the American concept of self-government. The Declaration of Independence describes the breakdown of the petitioning process as an affront to a "free people:"

> "In every state of these Oppressions we have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant is unfit to be the ruler of a free people." [33]

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[31] Such committees were established in Virginia in 1683, in Maryland in 1669, in New York in 1699, and in Pennsylvania in 1682. *See M. Clarke, Parliamentary Privilege in the American Colonies* 210-14 (1943).

[32] *Id.* at 115.

[33] A similar reliance on the right to petition as a ground for the assertion of self-government is found in the preamble to the Declaration and Resolves of the First Continental Congress: "[W]hereas, assemblies have been frequently dissolved, contrary to the right of the people, when they attempt to deliberate on grievances; and their dutiful, humble, loyal and reasonable petitions to the crown for redress, have been repeatedly treated with contempt, by his Majesty's Ministers of State." *B. Schwartz, supra* n. 25, at 216. Also, the Declarations of Rights enacted by state conventions frequently included a right to petition. *See, e.g.*, the Pennsylvania Declaration of Rights (1776), *id.* at 266; Delaware Declaration of

Harris v. Huntington, 2 Tyler 129 (Vt. 1802), the earliest judicial analysis in the United States of the common law immunity accorded petitioning, shows that the common law principle of absolute immunity for petitioners, clearly expressed in *Lake v. King*, *supra*, was understood to be the rule in this country.[34] *Harris v. Huntington* involved facts strikingly similar to the present case. The defendant had filed a petition with the Vermont legislature complaining of plaintiff's actions as a justice of the peace and asking the legislature to deny his reappointment. Plaintiff brought a libel action alleging false and malicious statements. Defendant claimed that absolute immunity attached to petitioning activity under the common law and the Vermont Bill of Rights.[35] Because the court thought of the issue as "a question of greater magnitude, and more interesting to the people of Vermont than any which has hitherto agitated in this Court," *id.* at 135, it analyzed the common law in great detail. Citing *Lake v. King*, *supra*, which the court described as holding that no cause of action would lie because the petitioner there "had presented his petition to a committee appointed by the commons . . . who had full power to hear and redress the grievance complained of," *id.* at 138, the court concluded that the defendant's actions were absolutely immune:

Rights (1776), *id.* at 277; North Carolina Declaration of Rights (1776), *id.* at 287; New Hampshire Bill of Rights (1783), *id.* at 379.

[34] This was so even though absolute immunity was again under attack in England in the late 1790's. Petitioning in the late 1790's had taken on a mass political dimension in England, which invoked a harsh parliamentary response. In response to an assembly of 150,000 persons petitioning for parliamentary reform, the removal of certain ministries, and termination of the war with France, Parliament had passed a law outlawing meetings of more than 50 persons, held to petition the King, "except in the presence of a magistrate with authority to arrest everybody present." *Brandt, The Bill of Rights*, 245 (1965).

[35] The Vermont Bill of Rights provided: "[T]hat the people have a right to apply to the legislature for redress of grievances, by

> "An *absolute and unqualified immunity* from all responsibility in the petitioner is indispensable, from the right of petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects and then punish them for the use of it.
>
> And it would be equally destructive of the right, for the Courts of Law to support actions of *defamation* grounded on such petitions as libellous." *Id.* at 139-40 (emphasis added).

The court then explained its holding with reasoning equally applicable here:

> "Petitions for redress of grievances will generally point to officers of the government, who have or may be supposed to have abused its confidence by mal-administration; and although government should refrain from prosecuting the petitioners criminally, yet it would operate as effectual a restraint upon them to expose them to an action for damages at the suit of those of whose conduct they have complained to government." *Id.* at 140.

The court's opinion demonstrates that the *Seven Bishops* case was well known in this country, as were the Crown's repeated attempts to violate the immunity attaching to petitioning. *Id.* at 141-42. It shows also that abuse of the right to petition was understood as a cause of the English Revolution of 1688, just as it had been cited as a justification for the American Revolution in the Declaration of Independence.

Finally, the court explicitly ruled that the public welfare requires absolute immunity for petitioning, *even if* exercise of that right sometimes causes injury to reputation:

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address, petition, or remonstrance." *Harris v. Huntington*, 2 Tyler at 143. The petition clause in the federal constitution provided even broader protection. It protected petitions to "the Government," not just to "the legislature."

> "But if this right of petitioning for a redress of grievances should sometimes be perverted to the purpose of defamation, as the right of petitioning with impunity is established both by the common law and our declaration of rights, the abuse of the right must be submitted to in common with other evils in government, as subservient to the public welfare." *Id.* at 146.[36]

In sum, under *Harris v. Huntington*, the earliest American case to consider the issue, the common law rule adopted in this country afforded absolute immunity for private petitioning.

The courts below thought this case was "governed" by this Court's decision in *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), which correctly viewed the common law immunity available to individuals who petition the President as coextensive with that available to participants in judicial proceedings, but incorrectly understood both to extend no further than a qualified privilege.[37] With respect to judicial proceedings, this conclusion has been widely and justly criticized;[38] similar criticisms apply to the conclusion with respect to petitioning the President.

In *White*, the Court did not even purport to address the constitutional protection afforded petitioning activity, so *White* certainly does not "govern" the issue before this Court. But neither is *White* an accurate analysis of the

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[36] The court's equation of defamatory petitions with "other evils in government" reflects the contemporaneous understanding that petitioning is an act of self-government.

[37] "The privilege spoken of in the books . . . signifies this, and nothing more; that the excepted instance shall so far change the ordinary rule, with respect to slanderous or libelous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice . . ." 44 U.S. at 287.

[38] See *Briscoe v. LaHue*, 460 U.S. 325, n. 12 (1983); *Johnson v. Brown*, 13 W. Va. 71 (1878); Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 *Colum. L. J.* 463, 465-66 (1909).

common law understanding of the right to petition at the time of the adoption of the First Amendment.

The common law cases cited in *White* do not support its general conclusion on the complete absence of absolute immunity, or its narrow conclusion on the absence of such immunity for petitioning the President.[39] *White* dismisses *Lake v. King*, *supra*, as an "anomalous decision," but cites no other decision on point.[40] *White* does not distinguish or even mention *Harris v. Huntington*, *supra*, although counsel for defendant had relied upon that case.[41] *Id.* at 282. *White* relies exclusively on the

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[39] For its general conclusion, *White* cites several cases that do not involve governmental functions at all, but rather, private issues such as whether an action can be brought by an employee against his employer for comments about his qualifications. *Cockayne v. Hodgkisson*, 5 Car. Pa. 543; *Wright v. Hawkins*, 1 T.R. 110; *Child v. Affleck*, Barn. Cress. 406. None of these bears on the scope of immunity for government proceedings or functions. *White* incorrectly relies on *Johnson v. Evans*, 3 Esp. 32, which, in fact, held that words spoken in "the course of legal or judicial proceedings [cannot] support an action for slander." *White* also confuses the issue of immunity for publication of a report of judicial proceedings, with that for statements during such proceedings. *Curry v. Walter*, 1 Bos. Pul. 525; *Rex v. Fisher*, 2 Camp. 563; *Rex v. Crevy*, 1 M. S. 273; *Delegal v. Highly*, 3 Bing. N.C. 690; *Lewis v. Walter*, 4 Barn. & Ald. 605; *Flint v. Pike*, Barn. & Ald. 473.

[40] In fact, *Lake v. King* is the only pre-Revolutionary case cited in *White*. Had the Court examined other pre-Revolutionary sources, it could not have described *Lake v. King* as "anomalous." It is true, as noted above, that starting in the late 1790's and continuing well into the 1800's, the right to petition was again under attack in England. Indeed, in the 1830's, the right to petition for the abolition of slavery was under attack in Congress by Sen. Calhoun and other proponents of slavery. See the Appendix to this brief. The Court, writing in 1845, was certainly aware of that relatively recent history. But the Framers were not aware of that history and the petition clause should not be interpreted as if they were.

[41] *White* cites just two American cases. The first, *Commonwealth v. Clapp*, 4 Mass. 169 (1808), had no relation whatever to petitioning activity—it involved an allegedly libelous statement made in a sign posted in a public place. The second, *Bodwell v. Osgood*, 3 Pick 379 (1825), involved an action based on a letter to a local school committee concerning the plaintiff—a teacher employed by

position urged by Chancellor Kent in his Commentaries. As the Court acknowledges, Kent relied largely on the English case of *Fairman v. Ives*, 5 Barn. & Ald. 642 (1822). But *Fairman* did not involve petitioning to complain about governmental wrongdoing; it involved a letter to the Secretary of War concerning a private debt owed by an individual under his command. Further, the Court fails to recognize that Kent's position had been rejected by the New York Court of Errors, on which he sat. In *Thorne v. Blanchard*, 5 Johns 508 (1809), Kent was forced to dissent on whether a petition to the New York Council of Appointment seeking removal of a public officer would support a cause of action for libel. The reasoning of Sen. Clinton—one of the judges constituting the majority denying a cause of action—is particularly relevant here. Describing the right to petition as a "right essential to the very existence of a free government [and] necessarily connected with the relations of constituent and representative," *id.* at 528, he concluded:

> "The freedom of inquiry, the right of exposing maladversion in public men and public institutions, to the proper authority, the importance of punishing offenses, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels, in case of that, or of an analogous nature." *Id.* at 530.

Thus, the historical materials show that at the time of the adoption of the First Amendment, petitioner's letters to the President would have been absolutely immune from libel actions.

B. The Framers Clearly Intended The People, As The Ultimate Sovereign, To Have Even Greater Rights To Participate In Self-Government Than Had Been Enjoyed By British And Colonial Subjects.

The people-at-large have a unique place in our constitutional scheme. As Madison explained in his Report on

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that committee. Whether the case was viewed as involving a petition to local government, or simply a complaint to an employer, is not clear.

the Virginia Resolution, "[t]he people, not the government, possess the absolute sovereignty."[42] 4 *Elliot's Debates On The Federal Constitution* (1876) at 569. Madison recognized this as the essential difference between the British and American forms of government: in England, "all the ramparts for protecting the rights of the people . . . are not reared against Parliament. . . . They are merely legislative precautions against Executive usurpation." *Ibid.* In the United States, by contrast, "the great and essential rights of the people are secured against legislative as well as executive ambition."[43] *Ibid.* Petitioning was viewed as one such "right" and one such "rampart."

Just as petitioning played a critical role in developing the British concept of parliamentary sovereignty, it played a critical role in developing post-revolutionary America's expanded concept of popular sovereignty. The American counterpart to the struggle between Parliament and King was the struggle between the people-at-large and government itself.[44] Petitioning came to be seen as the direct expression of the people's sovereignty, which served as a necessary check on the formal institutions of government.

The right to petition was therefore closely associated with the controversy over the constituents' right to "instruct" their representatives.[45] This controversy was

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[42] Quoted with approval in *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964).

[43] This Court has noted that our "form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects," and therefore requires even greater freedom for the people. *New York Times Co. v. Sullivan*, 376 U.S. 254, 274-75 (1964).

[44] See the discussion of the "people out-of-doors" in G. Wood, *The Creation of the American Republic, 1776-1787*, 319-28 (1969).

[45] The right of instruction was already contained in several state constitutions. Pennsylvania Declaration of Rights (1776), North

part of the extensive post-Revolution reconsideration of the legitimacy of representative institutions in a popular democracy: "There is scarcely a newspaper, pamphlet, or sermon of the 1780's that does not dwell on this breakdown of confidence between the people-at-large and their representative governments." [46]

The petition clause was debated in the House of Representatives of the First Congress on August 15, 1789.[47] There was universal agreement that a self-governing people must at least have the right to *request* governmental action, through petitions. The only issue was whether the concept of self-governance also required that the people be able to *compel* governmental action, through "instructions." The debate therefore focused almost exclusively on whether to add a right to instruct to the right to petition.[48] The practice of instruction was defended as an inherent right of a self-governing people.[49]

Carolina Declaration of Rights (1776), New Hampshire Bill of Rights (1783). *See* Schwartz, *supra* n. 25 at 216.

[46] G. Wood, *supra* n. 44, at 368.

[47] No record was kept of the Senate debate, which occurred on Sept. 4, 1789. B. Schwartz, *supra* n. 25, at 146.

[48] The petition clause had been recommended by North Carolina and Virginia, both of which had also recommended "a declaration that the people have a right to instruct their representatives." 1 Annals of Congress 732 (Aug. 15, 1789) (Remarks of Mr. Tucker).

[49] "Our Government is derived from the people, of consequence the people have a right to consult for the common good; but to what end will this be done, if they have not the power of instructing their representatives." 1 Annals of Congress 734 (Remarks of Mr. Page). Similarly, Mr. Gerry stated: "The friends and patrons of the constitution have always declared that the sovereignty resides in the people . . . . to say that sovereignty vests in the people, and that they have not a right to instruct and control their representatives, is absurd to the last degree." *Id.* at 737. *See also id.* at 744 (instruction "was strictly compatible with the spirit and nature of the Government; all power vests in the people of the United States; it is therefore, a Government of the people, a democracy. If it were consistent with the peace and tranquillity of the inhabitants,

The critical opposition to this position turned largely on an even broader principle of popular sovereignty: because the Constitution had been adopted through an extraordinary process by the people-at-large, instructions from a particular constituency could not bind a representative to act in an unconstitutional manner, *i.e.*, contrary to the collective will of the people.[50]

As even those in favor of instruction admitted, representatives must be free to judge whether to obey an arguably unconstitutional instruction.[51] Once it was conceded that instructions could not be binding, the distinction between instructions and petitions collapsed. Both served the same self-governmental function of allowing direct involvement by the people-at-large in the deliberations and decision-making processes of government.

Madison made clear that the right to petition encompassed the virtues, but not the vices, of instructions:

> "[T]he people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will. If gentlemen mean to go further, and to say that the people have a right to instruct their representatives in such a sense as the delegates are obliged to conform to those instructions, the declaration is not true." 1 Annals of Congress 738. (Aug. 15, 1789).

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every free man would have a right to come and give his vote upon the law; but inasmuch as this cannot be done . . . the people have agreed that their representative shall exercise a part of their authority. To pretend to refuse them the power of instructing their agents [denies] them a right.") (Remarks of Mr. Page).

[50] Madison posed this problem: "Suppose they instruct a representative, by his vote, to violate the constitution; is he at liberty to obey such instruction?" 1 Annals of Congress 738 (Aug. 15, 1789).

[51] 1 Annals of Congress at 744 ("I would tell them [the instructors] . . . it was unconstitutional; alter that and we will consider the point.") (Aug. 15, 1789) (Remarks of Mr. Page).

In short, petitioning was understood as directly rooted in popular sovereignty: it was to stand apart from, and serve as a check on, representative institutions. Just as the Constitution establishes checks and balances between branches of government, the right to petition establishes a checking balance between the people-at-large and government.

This petition/check was understood to be at least as important a mechanism of self-government as was the right to vote. Indeed, it had a far broader scope than the right to vote. Petitioning was in many circumstances the only way for citizens to participate directly in self-government. There were, for example, substantial limitations on who could vote, but none on who could petition. Because neither the President nor Senators were directly elected, petitioning was the only way citizens could exercise direct influence on a substantial portion of the government. Furthermore, although petitioning and voting are the two ways citizens participate directly in self-government, voting is only periodic, and is not usually on concrete issues. Voting is therefore not as useful as petitioning for checking or criticizing specific governmental actions or policies. Thus, petitioning against the appointment of a federal official was, and is, the functional equivalent of voting against the election of a federal official.

The Framers understood that any interference with the right to petition would threaten a self-governing people's ability to check and balance the organized institutions of government. The separate treatment of petitioning in the text of the First Amendment, as well as its description as a "right," demonstrate an intent to afford petitioning an even more protected role in our constitutional structure than it had enjoyed in England and colonial America. Read in the light of this history, the petition clause must be deemed to afford absolute immunity to petitioner's letters to the President.

II. BECAUSE PETITIONING SERVES THE CRITICAL FUNCTION OF ENABLING A SELF-GOVERNING PEOPLE BOTH TO INFORM GOVERNMENT AND TO CHECK ABUSES OF GOVERNMENTAL POWER, PRIVATE PETITIONS SHOULD BE AFFORDED THE SAME ABSOLUTE IMMUNITY FROM COMMON LAW LIBEL ACTIONS OTHER GOVERNMENT AND GOVERNMENT-RELATED FUNCTIONS ALREADY ENJOY.

As shown in Point I, historical analysis requires a rule of absolute immunity for petitioning. Functional analysis requires the same result. In our system of government, petitioning is the method by which ordinary citizens obtain direct access to government. It is the means by which citizens exercise their self-governmental functions of informing and checking government. (For early examples of the important checking and informing functions served by petitions, see the Appendix to this brief). These functions would be severely undermined if petitions could be subjected to state common-law libel actions.

The checking function served by petitioning is just as important to maintaining the balance between a limited government and the sovereignty of the people-at-large as are the internal checks and balances among the three branches of government or the balance between the national government and the states. Madison properly characterized this relationship: "If we advert to the nature of Republican government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress 934 (1794). That balance cannot be maintained if the checking function of the people-at-large is subject to common law libel actions brought by the officials of whose conduct they complain.

It would be fundamentally inconsistent with our system of government to afford the people less immunity when they exercise their self-governmental functions than is afforded executive, legislative and judicial officials when they exercise their governmental functions. Ac-

cordingly, the same degree of immunity from common law libel actions that protects executive, legislative and judicial officials should protect private petitioners. So long as their statements are arguably relevant to their governmental responsibilities—or are within the "outer perimeter" of those responsibilities—statements by officials of the executive,[52] legislative[53] and judicial[54] branches are absolutely immune from common law libel actions, even if those statements are alleged to be malicious or knowingly false. Absolute protection is afforded not because society wants to protect knowingly false and defamatory statements by officials of those branches, but because a lesser degree of immunity would subject government officials to the burdens and risks of litigation and would therefore chill and interfere with the performance of their governmental responsibilities. The prospect of litigation would have the same effect on private petitioners.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 282-283 (1964), immediately after citing *Barr v. Matteo*, 360 U.S. 564 (1959), which held that defamatory statements by federal executive branch officials are "absolutely privileged" from common law libel actions, this Court acknowledged that:

> "Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer . . . . It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a *fair equivalent* of the immunity granted to the officials themselves." (emphasis added).

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[52] *Barr v. Matteo*, 360 U.S. 564 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Yaselli v. Goff*, 12 F.2d 396 (1926); *aff'd per curiam*, 275 U.S. 503 (1927).

[53] *See Gravel v. United States*, 408 U.S. 606 (1972); *Prosser and Keeton, On Torts* 816 (1984), and the authorities cited therein.

[54] *Prosser and Keeton, supra* n. 53 at 820, and the authorities cited therein.

The statements at issue in *Sullivan* were protected only by the speech or press clauses. For those statements, made to the public at large, a qualified privilege was deemed a "fair equivalent." However, when the citizen is not speaking to the public at large, but is directly exercising his right to petition, and is thus performing a self-governmental function, the only "fair equivalent" of the absolute immunity from common law libel actions enjoyed by officials is absolute immunity for the petitioner. As the court ruled in *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923):

> "For the same reason that members of the Legislature, judges of the courts, and other persons engaged in certain fields of the public service or in the administration of justice are *absolutely immune* from actions, civil or criminal, *for libel* for words published in the discharge of such public duties, the individual citizens must be given a like privilege *when he is acting in his sovereign capacity.*" (emphasis added).[55]

Restrictions on the right to petition thus pose a real danger of shifting the locus of the "censorial" power from the people-at-large to government. Citizens who have personal knowledge of abuses of governmental power will not bring those abuses to the attention of other officials if to do so would subject them to the burdens, costs, and risks of litigation brought by the official of whom they complain. The Framers intended for petitioners to check governmental officials, not for governmental officials to check petitioners. Thus, if the right to petition for redress of grievances caused by abuses of governmental authority is to play its intended role in our system of checks and balances, it cannot be subject to any government-imposed restrictions.

Just as important as the checking function is the informing function, which would also be severely under-

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[55] This case was cited twice in *New York Times Co. v. Sullivan*, 376 U.S. 254, 277, 291 (1964).

mined by any rule other than absolute immunity. This Court has emphasized that this informing function is a key element to the legitimacy of our representative institutions:

> "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold at the same time, that the people cannot *freely inform* the government of their wishes . . . would raise important constitutional questions." *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127, 137-38 (1961) (emphasis added).

Historically, as noted above, petitions to the various branches of government all evolved from a common root, and the same rule of absolute immunity applied. In many areas, this has remained the rule. Thus, private citizens already enjoy absolute immunity from common law libel actions when they initiate or participate in certain governmental functions—*e.g.*, initiating or testifying in judicial proceedings, or informing government of suspected violations of federal criminal laws. In each instance, absolute immunity is provided, in part, because of the need to assure the decision-maker that he will receive complete and candid information. This is deemed more important than the injury to individual reputation that may arise from an occasional abuse of the process. Protecting the overall balance of the governmental structure from the chilling effect on would-be petitioners caused by the prospect of having to defend a libel action outweighs whatever individual injury may occasionally arise.

For this reason, all complaints to the judicial branch are absolutely immune from defamation actions, even

though some complaints will be knowingly false.[56] Where, as here, governmental redress can come only from the executive or legislative branches, history and functional analysis combine to require that petitions to those branches be afforded the same absolute immunity afforded petitions to the judicial branch. Indeed, in our system of separation of powers, it would be inappropriate for the courts to afford absolute immunity when citizens petition the judicial branch, but not when they petition the President or the legislative branch.[57]

Similarly, the governmental need for full access to information has produced the common-law rule of absolute immunity for witnesses in legislative hearings. See, *supra* n. 53. Indeed, petitioner had offered to testify at

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[56] So long as the allegations in the complaint are relevant to the proceeding, complaints are absolutely immune from defamation actions, even in North Carolina, and even if knowingly false. *E.g., Scott v. Statesville Plywood & Veneer Co., Inc.*, 240 N.C. 73, 81 S.E.2d 146 (1954); *Wilson v. Sullivan*, 81 Ga. 238, 7 S.E. 274 (1888); *Meyers v. Sullivan*, 53 Fla. 197, 44 So. 357 (1907); *Texas Co. v. C.W. Brewer Co.*, 180 S.C. 325, 185 S.E. 623 (1936); *School Dist. No. 11, Laramie Co. v. Donahue*, 55 Wyo. 220, 97 P.2d 663 (1939); *Lann v. Third National Bank*, 198 Tenn. 70, 277 S.W.2d 439 (1954); *Massenqele v. Lester*, 403 S.W.2d 697 (K. App. 1966), *cert. denied*, 385 U.S. 1019 (1967); and *Selas Corp. of Amemia v. Wilshire Oil*, 344 F. Supp. 357 (E.D. Pa. 1972) (applying Pennsylvania law). Ironically, if, after successfully defending against this action, petitioner were to sue respondent for defamation, alleging that respondent's complaint in this action was *itself* defamatory and knowingly false, petitioner's suit would be summarily dismissed.

[57] Although petitions to the executive or legislative branches may —like petitions to the judicial branch—occasionally contain "rhetorical hyperbole," or even untruth, the Court should not assume that the executive and legislative branches are incapable of determining the appropriate weight to give factual allegations in petitions. Officials of the executive and legislative branches (and certainly the recipients of petitioner's letters) have the sophistication, experience and resources to evaluate particular communications. Indeed, those branches have greater investigative resources (law enforcement agencies; staff investigators; etc.) than does the judicial branch, and much greater experience in evaluating comments about candiates for political office.

public hearings, JA 12, but no hearing was scheduled or held. If there had been a hearing, petitioner could have read the contents of his letters into the public record and he would have enjoyed absolute immunity, even though the alleged damage to respondent's reputation in the community would have been greatly increased by such public testimony. The same rule of absolute immunity should protect petitioners who do not have the option of a public hearing. Surely the Framers did not intend the right to petition to be dependent on a congressional decision to schedule a public hearing. Indeed, many of the issues about which citizens might be expected to petition would not even be appropriate for public hearings.

These considerations show that any government-imposed restriction on petitioning is inconsistent with our constitutional structure. But *state*-imposed restrictions on the right to petition the national government are particularly intolerable. Petitioning has consistently been described by the Court as "among the most precious of the liberties guarded by the Bill of Rights," *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967), and as a right which "cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). The right to petition is a core right of national citizenship. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). State laws that restrict the content of petitions submitted directly to the national government present the same insurmountable problems of federalism addressed by this Court in *Crandall v. Nevada*, 73 U.S. 35 (1867), which held unconstitutional a one dollar state tax levied upon each person leaving the state on public transportation. The Court held that even this *de minimis* financial restraint was wholly incompatible with the constitutional structure of national government:

> "The people of these United States constitute one nation. They have a government in which all of them are deeply interested . . . that government has a right to call to [Washington, D.C.] any or all of its citizens to aid in its service . . . and this right cannot be made to depend upon the pleasure of a state . . . But if the government has those rights on her own account, the citizen also has correlative rights. . . . [A]nd this right is *in its nature independent of the will of any state* . . . ." *Id.* at 43-44 (emphasis added).

Similarly, the right to petition the national government is "in its nature independent of the will of any state" and can tolerate no direct state interference.

In the context of federal law enforcement, this Court has long affirmed that a citizen's communications to the national government cannot be subject to state restriction. In 1895, the Court stated:

> "It is [every citizen's] right and his duty to communicate to the executive officers any information which he has of the commission of an offense against [federal] laws . . . ." *In re Quarles*, 158 U.S. 532, 536 (1895).

From this premise, the Court concluded not only that Congress could pass laws to protect this federal right, but also that "such information, given by a private citizen, is a privileged and confidential communication for which *no action of libel or slander will lie* . . . ." *Id.* at 535-36.[58] The basis of this absolute immunity for the content of such communications to federal officials was found in the very structure of constitutional government. Echoing *Cruikshank*, *supra*, the Court stated that this privilege "arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." *Id.* at 536.

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[58] *See also Vogel v. Gruz*, 110 U.S. 311 (1884).

Quarles finds the immunity for citizen communications to the federal government to be analogous to, and, just as strong as, that of the government officials whose responsibilities include responding to those communications:

> "The right of a private citizen who assists in putting in motion the course of justice, and the right of the officers concerned in the administration of justice stand upon the same ground, just as do the rights of citizens voting and of officers elected . . . ." *Id.* at 536.

The "right and duty to communicate" regarding violations of federal criminal statutes is an important use of the right to petition, but there is no reasoned basis for affording the absolute immunity from libel actions recognized in *Quarles* only to petitions concerning violations of federal criminal statutes. The citizen's right and duty to participate in government is not defined or exhausted by federal criminal statutes. The rule of absolute immunity from state common law libel actions must extend, therefore, to every petition directed to national government that raises before appropriate officials issues relevant to national governance. The petitions in this case squarely meet this standard.

III. IN THE CIRCUMSTANCES OF THIS CASE, A BALANCING OF FEDERAL AND STATE INTERESTS REQUIRES ABSOLUTE IMMUNITY.

As shown in points I and II, historical and functional analysis combine to demonstrate that states do not have a constitutionally permissible interest in subjecting petitions to the federal government to any restraint whatsoever. Should the Court decide, however, that resolution of the scope of immunity appropriate in this case requires a balancing of federal and state interests, in the circumstances of this case, the federal interests are so strong and the state interest is so attenuated that the state interest cannot be deemed sufficiently compelling to justify the chilling effect it would have on the federal right to petition.

A. For Ordinary Citizens, The Prospect Of Having To Defend Against A Common Law Libel Action Would Substantially Chill Exercise of The Right To Petition.

This Court has consistently recognized that the threat of a substantial damages award or of substantial defense costs—and certainly of both—will cause some would-be critics of official conduct to "self-censor" their remarks entirely, and will cause others to steer far wide of any arguably unprotected remarks. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964):

> "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court *or fear of the expense of having to do so.* They tend to make only statements which 'steer far wider of the unlawful zone.' Speiser v Randall, supra, 357 US, at 526, 2 L ed 2d at 1473. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." (Emphasis added.)[59]

In recent years, the damages awarded in libel cases, and the costs of defending such cases, have each become very substantial.[60] The risk of huge damage awards and

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[59] *See also Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 103 S. Ct. 2161, 2169 (1983); *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Time, Inc. v. Firestone*, 424 U.S. 448, 475 (1976) (Brennan, J., dissenting); *cf. Hutchinson v. Proxmire*, 443 U.S. 111, 123 (1979) (purpose of the speech or debate clause is to protect legislators "not only from the consequences of litigation's results but also from the burden of defending themselves."). *See generally, L. Tribe, American Constitutional Law* § *12-12* 634 (1978).

[60] Members of this Court have recognized the alarming escalation of the costs of pre-trial discovery in civil litigation. *E.g.*, Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 *F.R.D.* 83, 95-96 (1976). And one member of this Court has noted that the "potential for abuse of liberal discovery procedures is of particular concern in the defamation context," where discovery can

the certainty of huge defense costs have been so widely reported that no informed citizen could be ignorant of the risks and costs of libel actions.[61]

Huge damage awards and defense costs obviously exert a chilling effect on the press.[62] But the chilling effect on ordinary citizens is likely to be even greater.[63] The press has both financial and institutional incentives to speak, despite the risk of libel suits. For the press, speech

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readily be used for the "in terrorem" purpose of deterring speech. *Herbert v. Lando*, 441 U.S. 153, 204-05, n. 1 (1978) (Marshall, J., dissenting) (citing authorities).

[61] For illustrations of this point, written for a lay audience, see Lewis, *Annals of Law: The Sullivan Case, The New Yorker* 52 (Nov. 5, 1984): "As important as the threat of large damages is the reality of high costs; they have risen even more precipitously in libel cases than in litigation generally. Nowadays, each side in a major libel action that goes to trial can expect lawyers' fees and other expenses in the millions of dollars." *Id.* at 52. Lewis reports that "in more than twenty recent libel cases, juries have awarded the plaintiffs damages of a million dollars or more . . . ." *Id.* at 78. Lewis cites a Libel Defense Resource Center survey of "damage judgments awarded in eighty libel trials between 1980 and 1983 [which] showed that the average award was $2,174,633," which was "triple the average award in a survey of medical-malpractice cases . . . ." *Id.* at 79. For additional examples, see *E. Pell, The Big Chill* 159-88 (1984).

[62] Judge Robert Bork, noting the chilling effect caused by "a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards," and noting that "those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments," has suggested, without holding, that absolute immunity might be required in some circumstances even for the press. *Ollman v. Evans*, —— F.2d —— (D.C. Cir. 1984) (Bork, J., joined by Wilkey, Ginsburg and MacKinnon, JJ., concurring, slip op. pp. 7, 1, and 2).

[63] Lewis, *supra* n. 61, at 78: "CBS and other corporate giants can afford to litigate against libel claims. Smaller defendants may find the cost ruinous." For examples where the press and other media have actually been deterred from publishing news because of the possibility of a libel action, see *id.* at 82; and *E. Pell, supra* n. 61, at 167-168.

is, at least in part, a business. Libel suits are a foreseeable risk and cost, often deductible, of that business. Commonly, the press will purchase libel insurance to cover some or all of the costs of defense, and of an award of compensatory damages.[64] But more than two-thirds of all libel defendants are private citizens and non-media defendants, most of whom do not have libel insurance.[65] Even if such defendants ultimately prevail, they must absorb the entire cost of their defense.[66]

If this Court does not afford ordinary citizens absolute immunity from common law defamation suits involving private petitions to the federal government, the inevitable consequence will be a particularly severe restraint on the right to petition. Just as allowing a defense of truth "does not mean that only false speech will be deterred," *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), requiring a libel plaintiff to prove knowing falsity does not mean that only knowingly false petitions will be deterred. A mere *claim* of knowing falsity will subject ordinary citizens to the certainty of substantial costs (and the risk of enormous damages), even if a jury ultimately determines that every word in their petitions had been true. Such a ruinous prospect would effectively operate as a prior restraint. The "right" to petition would be meaningless if ordinary citizens knew they

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[64] Because of state laws, it is almost impossible for the press (or for an individual) to insure against punitive damage awards. See generally, *E. Pell, supra* n. 61, at 164-65 (noting a two year study of libel actions finding "17 punitive awards of a quarter million or more," and noting that "no insurance can be purchased that is guaranteed to cover these damages . . .").

[65] Between January 1976 and June 1979, approximately 70% of the defendants in all reported defamation cases were non-media defendants. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 *Am. Bar Found. Research J.* 455, 497.

[66] Petitioner knew, from first-hand experience, how expensive it can be to defend against a claim of malicious defamation. JA 11. *See supra*, n. 6, and accompanying text.

could be required to pay $20,000, or more, for the privilege of writing a letter to their President.[67]

In recognition of that chilling effect, and its adverse consequences not only for citizens but also for the federal government, the United States appeared as *amicus* in *Webb v. Fury*, 282 S.E.2d 23 (W. Va. 1981), and successfully urged that court to afford absolute immunity, based on the petition clause, to citizens sued for libel because of their communications to federal agencies. The United States argued that qualified immunity would be inadequate because "the threat of a defamation suit will effectively chill the exercise of the right to petition. Unless the right to petition is privileged against suits such

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[67] One author estimated that in 1975—before the costs of defending libel actions began to escalate—the cost of defending a libel action ranged from $20,000 to $100,000. Anderson, *Libel and Press Self-Censorship*, 53 *Texas L. Rev.* 422, 435-36 (1975). The chill created by the prospect of defending against a common law libel action does not evaporate because of the theoretical possibility of obtaining early summary judgment. Although petitioner did, after "extensive" and costly discovery (*see* n. 6, *supra*), obtain summary judgment in the earlier defamation suit filed against him (where respondent represented the plaintiff), that case was decided before this Court held in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), that an action requiring proof of knowing or reckless falsity "calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." *See also, Hall v. Piedmont Publishing*, 46 N.C. App. 760, 266 S.E.2d 397 (1980) (summary judgment on the issue of actual malice is inappropriate in a suit brought by a public figure). In other defamation cases where actual malice was alleged, summary judgment has been found inappropriate even though pre-trial discovery had produced extremely comprehensive factual records. See *Herbert v. Lando*, 441 U.S. 153 (1979); *Westmoreland v. CBS*, —— F. Supp. —— (S.D.N.Y. 1984); *Sharon v. Time Inc.*, —— F. Supp. —— (S.D.N.Y. 1984). *See generally Briscoe v. LaHue*, 460 U.S. 325, 343, n. 29 ("summary judgment is usually not feasible" when "the central issue will be the defendant's state of mind"). Petitioner could establish the truth of many of the statements in his letters through reference to court records (see n. 5 and n. 6, *supra*), but many others would require extensive discovery and would turn on evaluations of the testimony and credibility of numerous witnesses, making summary judgment unlikely.

as [plaintiff's], it will lose any real meaning because private citizens will be deterred by the threat of litigation from exercising the right." [68]

B. In The Circumstances Of This Case, Anything Less Than Absolute Immunity Would Substantially Interfere With Several Important Federal Interests.

Subjecting petitioner to a common law libel action would interfere with so many federally protected interests that we will present them with only brief elaboration.

1. *Absolute immunity is required to protect federal officials from discovery and from judicial inquiries that would substantially interfere with the performance of their duties.*

Respondent alleges that his reputation was injured among the recipients of petitioner's letters, and that, as a consequence, he was not appointed U.S. Attorney. JA 5-7. Petitioner has denied those allegations. If this action is allowed to proceed, the truth of those allegations could only be determined through the testimony of the recipients. Thus, it would be necessary for respondent, petitioner, or both, to take the depositions of President Reagan, Senator Helms, etc., in order to find out whether

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[68] Reply Brief for the United States as *Amicus Curiae* in *Webb v. Fury, supra*, at 13. See also *id.* at 11 ("To allow a plaintiff to simply plead bad faith would create a chilling effect on the exercise of the right to petition."). And see Brief for the United States as *Amicus Curiae* in *Webb v. Fury, supra*, at 31, 34 ("A final constitutional protection afforded Webb, in addition to those discussed above, is the First Amendment right to petition the Government for a redress of grievances . . . . Persons who provide information to the federal government under these statutes [the Clean Water Act and the Surface Mining Act] should not be required to risk the possibility of a lawsuit and liability. The realization of the goals of these statutes requires an absolute privilege.") More recently, the House Joint Leadership has submitted a brief *amici curiae* urging recognition of an absolute privilege for communications from citizens to Congress. See Memorandum of the House Joint Leadership as *Amici Curiae*, dated June 14, 1982, submitted in *Webster v. Sun Company, Inc.* (D.D.C. No. 81-2867). See also the Supplemental Memorandum of the House Joint Leadership as *Amici Curiae*, dated July 6, 1984, submitted in the same case.

they read the letters; whether they believed the letters; who they contacted and what they did, if anything, to evaluate the truthfulness of the letters; what they found to be true as a result of those inquiries; whether the letters played any role in their decision and, if so, how much of a role; etc.[69]

Those depositions could cause the recipients of petitioner's letters to be absent from their official duties for considerable periods of time, and would necessarily probe deeply into the subjective and political considerations on which the decision not to appoint respondent was based.[70] The Court has held, largely for those reasons, that federal officials must be afforded absolute immunity from common law libel actions when they are sued directly.[71] The Court has not had occasion to decide whether the same federal officials would be immune from testifying as witnesses in common law libel actions. A rule affording the recipients of petitioner's letters a testimonial privilege from testifying in this action, where they are involved only as witnesses, not as defendants, would protect those officials, but it would deny petitioner a fair opportunity to rebut the allegations of the complaint. On the other hand, requiring the recipients to testify as witnesses would interfere with many of the same interests on which their absolute immunity as defendants is based. These problems will *always* arise in cases gov-

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[69] In fact, respondent noticed and has already taken the deposition of Rep. Johnston, his former law partner, which showed that Rep. Johnston's support for respondent's nomination "did not waiver or change" because of petitioner's letter. Transcript of Deposition of W. Eugene Johnston, III, June 28, 1982, p. 42. Indeed, Rep. Johnston acknowledged that he had been accurately quoted as having said "I think a lawsuit makes no sense at all, because [petitioner's] letters had no influence on me, or anyone else to my knowledge." *Id.* at 51.

[70] It was Rep. Johnston's opinion, for example, that "the need for a geographical balance . . . was a factor" in the decision not to appoint respondent. *Id.* at 50-51.

[71] See notes 52-54, *supra*.

erned by the petition clause, where, as here, the sole recipients of an allegedly defamatory communication are high federal officials.[72]

2. *Absolute immunity is required so that federal officials will receive factually relevant information concerning candidates for appointment to federal office.*

The federal government has a substantial interest in ascertaining the fitness of candidates for appointment to high federal office, and, therefore, an interest in encouraging and receiving candid communications about such candidates, particularly from those citizens—necessarily few in number—who have relevant first-hand information.

The President could not adequately fulfill his constitutional responsibility for nominating individuals to the office of U.S. Attorney if he did not have as much information as possible regarding the qualifications of the candidates.[73] The Federal Bureau of Investigation could not adequately perform background investigations if it could not receive candid communications from informants.[74] The Senate must have access to as much information as possible regarding the qualifications of a presidential nominee if it is adequately to perform its con-

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[72] By contrast, these kinds of problems will almost never arise in cases governed by the speech or press clauses, because the injury to reputation in such cases is almost always among the general public.

[73] That position requires nomination by the President and confirmation by the advice and consent of the Senate. 26 U.S.C. § 541 (1976).

[74] The F.B.I. performs background investigations on candidates for the office of U.S. Attorney. *See* E.O. 10450, *printed at* 5 U.S.C. § 7311 note (1976); 29 C.F.R. § 0.85(c) (1981); 46 Fed. Reg. 60321 (1981). Such investigations may be conducted on a confidential basis at the informant's request, *see* 5 U.S.C. § 522a(a)(k)(5) (1976), and the file prepared by the Bureau often contains unsubstantiated, untrue, and possibly defamatory allegations.

stitutional responsibility of advising and consenting to the nomination.[75]

In *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), this Court ruled that "anything which might touch on an official's fitness for office is relevant." And in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971), this Court ruled that the broad rule of relevance formulated in *Garrison* applied "with special force to the case of the candidate," as here, because "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." [76]

All the facts in petitioner's letters would at least "touch on" respondent's fitness for the office of U.S. Attorney, and most would be highly relevant.[77]

3. *Absolute immunity is required so that federal officials will receive politically relevant information concerning candidates for appointment to federal office.*

Appointing officials have a substantial *political* interest in learning how citizens feel about candidates. If a

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[75] *See* n. 73, *supra*. It is particularly important to immunize citizen communications about appointed officials, because those officials are less likely to be subjected to widespread media and public scrutiny than are elected officials.

[76] It further held "as a matter of *constitutional law* that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co. v. Sullivan*." *Id.* at 277 (emphasis added). *See also Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971). By fashioning this special rule of evidence, this Court once again showed its willingness to afford special protections when necessary to safeguard First Amendment rights. See Point IV, *infra*.

[77] For example, if respondent was known among the constituency as "Mad Dog Smith," JA 9, his appointment as U.S. Attorney would not inspire confidence in the impartial and even-handed administration of that office. If he had shown a lack of regard for civil rights, if he had summarily imprisoned a black attorney, if he had ignored federal court orders to produce relevant documents, all of that would have been relevant to his fitness for the office he sought.

candidate for appointment to federal office is held in contempt by the citizens who would be under his jurisdiction, that fact is relevant to the political appointment decision because officials can be expected to govern more effectively if they have the respect of the governed. Even a knowingly false petition conveys this sort of *politically relevant* information. Petitions have, and should have, political consequences, regardless of the motives of the petitioner, just as votes have and should have political consequences, regardless of the motives of the voter.[78]

4. Absolute immunity is required to further the federal interest in the peaceful resolution of grievances involving the national government.

There is a strong federal interest in providing an orderly way to seek redress of "grievances" so citizens will not resort to violence, or even insurrection. The Framers knew, as the Declaration of Independence asserted, that England's disregard of colonial petitions seeking redress from "oppressions" had been a major justification for the American Revolution. The petition clause was drafted with that history of "oppressions" in mind, and was not designed to protect only the communication of neutral facts by disinterested on-lookers. The history of petitions, and the very phrase "redress of grievances," plainly reveal that the Framers expected strongly and even bitterly held views to be communicated to government. A "grievance," by its very nature, is likely to provoke intense feelings, and intense language. Persons "aggrieved" by abuses of governmental power cannot be expected always to express their grievance in temperate language. The Framers knew that a petition from an outraged citizen alleging that he was personally ag-

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[78] In the context of the speech and press clauses, where the primary theoretical model is the competition for *truth* in the marketplace of ideas, this Court has said that no constitutional value is served by communication of knowingly false statements. But truth is not the only value served by petitioning. Communications protected by the petition clause serve the constitutional value of enabling citizens to participate in self-government, whether those communications are knowingly false or not.

grieved by an official abuse of power would quite often be defamatory under common law standards. But the Framers were not as concerned about abuses of rights by self-governing citizens as they were about abuses of power by representative officials. Occasional abuses of the right to petition were seen as an unavoidable cost of self-government. As Madison said, "[s]ome degree of abuse is inseparable from the proper use of every thing . . . ." [79]

5. Absolute immunity is required to enable citizens to participate in self-government.

Finally, of course, is the general interest embodied in the petition clause itself, which enables citizens to participate in self-government by informing government and by checking abuses of governmental power. That interest has been fully described above. It applies with particular force in the circumstances of this case because petitioner was petitioning against the appointment of an individual who was seeking appointment to a high federal office that would have given him direct and substantial governmental power over petitioner. Because petitioner could not vote against that appointment, petitioning was the only way he could participate in the decision-making process.

C. In The Circumstances Of This Case, The State Interest In Protecting Individual Reputation Is Greatly Attenuated.

The only state interest to be weighed against these substantial federal interests is its interest in compensating victims of defamation: "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). *See also Time, Inc. v. Hill*, 385 U.S. 374, 391 (1967). That state interest is greatly weakened

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[79] 4 *Elliot's Debates on the Federal Constitution* (1876), p. 571, *quoted in New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964), and in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). *See also, City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86, 91 (1923).

where, as here, the individual is a candidate for public office, because candidates, even more than public officials, have voluntarily subjected their reputations to scrutiny.[80] The state interest is further attenuated where, as here, the candidate's reputation is diminished, if at all, not in the local community, but only in the minds of a few federal officials.

Accordingly, in the circumstances of this case, the state's negligible interest in compensating a candidate for federal office for alleged injury to his reputation is not sufficiently compelling to outweigh the very substantial federal interests that would be undermined by subjecting petitioner to the certain and substantial costs of a common law libel action.

Even in circumstances less compelling than here, several courts have decided, after noting the chilling effect on the right to petition posed by defamation actions, that the federal interests protected by the petition clause outweigh the state interest in protecting reputation. They have therefore ruled that petitioners enjoy absolute immunity from common law defamation actions, even when their petitions are alleged to be knowingly false and malicious. *E.g.*, *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981); *Sherrard v. Hull*, 296 Md. 189, 460 A.2d 601 (Md. 1983), *affirming*, 53 Md. App. 553, 456 A.2d 59 (1983); *Bass v. Rohr*, 57 Md. App. 609, 471 A.2d 752 (1984), *cert. dismissed as improvidently granted*, — Md. —, 484 A.2d 275 (1984); *Miner v. Novotny*, 481 A.2d 508 (Md. Spec. App. 1984). *See also*, *Rudnick v. Harsha*, 470 F. Supp. 285, 297 (M.D. Pa. 1978) (right to inform is analogous to the right to petition, and in-

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[80] *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 345 (1974); *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971). Indeed, in *Monitor* the Court remarked that "[*i*]*f actionable defamation is possible in this field*, one might suppose that the chief energies of the courts, for some time after every political campaign, would be absorbed by libel and slander suits," 401 U.S. at 274 n. 4 (quoting Noel, *Defamation Of Public Officers and Candidates*, 49 *Colum. L. Rev.* 875 (1949)) (emphasis added).

forming cannot be the basis of a defamation action despite an allegation of malice); *Campo v. Rega*, 79 A.D. 2d 626, 433 N.Y.S.2d 630 (2nd Dept. 1980) (complaint concerning police officer absolutely immune from action for defamation).

In addition, the importance of the federal interests protected by the petition clause have led this Court—and many others—to limit the reach of competing state and even federal interests so they would not intrude on petitioning activity, regardless of the subjective motives of the petitioner. *E.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978); *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972); *Weiss v. Willow Tree Civic Association*, 467 F. Supp. 803 (S.D.N.Y. 1979); *City of Long Beach v. Bozek*, 31 Cal.3d 527, 187 Cal. Rptr. 86, 645 P.2d 137 (1982), *vacated and remanded on issue of independent state grounds*, 459 U.S. 1095 (1982), *aff'd on state constitutional grounds*, 33 Cal.3d 727 (1983); *Smith v. Silvey*, 149 Cal. App. 3d 400, 197 Cal. Rtpr. 15 (Cal. App. 2 Dist. 1983).

A rule of absolute immunity is particularly appropriate in the circumstances of this case.

IV. EVEN IF THE INTERESTS PROTECTED BY THE PETITION CLAUSE DO NOT REQUIRE ABSOLUTE IMMUNITY FROM COMMON LAW LIBEL ACTIONS, THEY DO REQUIRE ADDITIONAL PROTECTIONS, INCLUDING JUDICIAL DISCRETION TO AWARD COSTS AND FEES TO PREVAILING DEFENDANTS.

The petition clause must have some meaning different from the speech or press clause if it is not to be reduced to mere surplusage. If petitions are not absolutely im-

mune from suit, the Court should at least afford special protections in order to minimize the risk that legitimate petitioning will be chilled by the fear of vexatious and costly litigation.

A. This Court Has Consistently Recognized The Need For Special Procedural And Substantive Protections To Safeguard First Amendment Values.

This Court has held in a variety of contexts that special protections are necessary in order to safeguard the values protected by the First Amendment. Indeed, the judge-made requirement that public figure plaintiffs must allege and prove knowing or reckless falsity in libel cases is such a special rule "designed to preserve the robust exchange of ideas and information which is essential to our way of life." *Webb v. Fury*, 282 S.E.2d 28, 47 (W. Va. 1981) (Neely, J., dissenting). The Court has also ruled that knowing or reckless falsity must be shown not only by the preponderance of the evidence, but with "the convincing clarity which the constitutional standard demands . . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 286-87 (1964).

This Court does not ordinarily re-examine the factual findings of state courts. But when it is claimed that the state has denied a right protected by the First Amendment, the Court conducts its own review of the record.[81] Similarly, although an individual ordinarily may not challenge a statute on constitutional grounds if the statute would be constitutional as applied to him, in the First Amendment context, a statute can be challenged on its face for overbreadth.[82] And in *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), the Court adopted a special

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[81] *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-85 (1964). *See also Bose Corporation v. Consumers Union*, 104 S. Ct. 1949, *petition for rehearing denied*, 104 S. Ct. 3561 (1984) (citing cases); *Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971).

[82] *See, e.g., Coates v. City of Cincinatti*, 402 U.S. 611 (1971); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Kunz v. New York*, 340 U.S. 290 (1951).

rule of relevance to govern libel actions brought by candidates for public office.

In sum, this Court has afforded special safeguards whenever necessary to ensure that important First Amendment values are not infringed.

B. The Interests Protected By The Petition Clause Require Special Protections For Defendants In Libel Cases Governed By The Petition Clause.

Defendants sued for libel based on petitioning activity should be entitled, either automatically or at least in the trial court's discretion, to recover reasonable attorneys' fees and costs from unsuccessful plaintiffs.[83] This rule would significantly reduce frivolous or "strike" suits. It would also reduce, although not eliminate, the chilling effect that fear of liability has on potential defendants, while permitting plaintiffs who are actually injured to recover damages.

The Court should also require that allegations of malice be supported by specific factual allegations in the complaint, sufficient of themselves, unless rebutted, to support a finding of knowing falsity or reckless disregard, and should adopt more lenient standards for granting summary judgment to petitioners.[84]

Finally, the state's interest in compensating victims of defamation for actual injury to their reputations is not sufficient to justify the additional chilling effect created by the prospect of punitive damages. Victims of defamation do not need punitive damages in order to be made financially whole, or to vindicate their reputations.[85] The sole purpose of punitive damages is deterrence. But de-

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[83] *See Webb v. Fury*, 282 S.E.2d 28, 43-48 (W.Va. 1981) (dissenting opinion).

[84] *See id.* at 47 (dissenting opinion).

[85] Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

terring libel in this context will necessarily deter legitimate petitioning as well, and the state does not have a legitimate or compelling interest in deterring citizens from exercising their governmental right and duty to petition the federal government. The Court has recognized that the prospect of punitive damages "unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). At minimum, therefore, the Court should hold that petitions to the federal government are absolutely immune from common law actions for punitive damages, and should limit the plaintiffs in such actions to recovery of actual damages.[86]

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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January 24, 1985

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[86] *See generally* Anderson, *Reputation, Compensation and Proof*, 25 *Wm. & Mary* L. Rev. 747, 749 (1984).

APPENDIX

APPENDIX

Early Examples of the Checking and Informing Functions Served by Petitions

Two early examples illustrate the central function of the right to petition in the constitutional structure of self-government. The first—the response to the Alien and Sedition laws—illustrates the checking or negative function of the right of petition; the second—the abolitionists' petitioning campaign—illustrates the informing or positive function of petitioning. Both are critical components of a constitutional system designed to maintain sovereignty in the people.

Passage of the Alien and Sedition Acts in 1798 triggered the first sustained petitioning activity under the new constitution. The Sedition Act made it a crime to "write, print, utter or publish . . . any false, scandalous and *malicious* writing or writings against the government of the United States, or either House of Congress . . . or the President . . . with *intent to defame* . . . or to bring them . . . into contempt or disrepute." 1 Stat. 596 (emphasis added). Although never directly reviewed by this Court, this attempt to shield government from "malicious" criticism has been found unconstitutional "in the court of history." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). That the historical response to this unconstitutional attempt to still the expression of political grievances took the form of petitioning was both appropriate and revealing: appropriate because the Act was itself invoked to limit the right to petition;[1] revealing because of the scope of petitioning activity.

Two state legislatures—Virginia and Kentucky—passed resolutions/petitions protesting against the Acts as "pal-

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[1] In New York State, Jedidiah Peck was arrested and indicted for circulating a petition to Congress seeking repeal of the Alien and Sedition Acts. *United States v. Jedidiah Peck*, Sept. 4, 1799, RG 21 (National Archives) (manuscript indictment). The case is discussed in *J. Smith, Freedom's Fetters* 390-98 (1966).

pable and alarming" infractions of the Constitution.[2] The Virginia petition specifically invoked the sovereign authority of the people—and of the states—to oppose unconstitutional actions by the federal government:

> "The General Assembly doth solemnly appeal to like dispositions in the other states, in confidence that they will concur with this commonwealth in declaring . . . that the acts aforesaid are unconstitutional, and that the necessary and proper measures will be taken . . . in maintaining, unimpaired, the authorities, rights, and liberties reserved to the states respectively, or to the people." 4 *Elliot's Debates On The Federal Constitution* (1876) at 578.

Private citizens and aliens[3] also protested the Acts through petitions to Congress.[4] In response to Federalist efforts to reject all petitions on this subject, Rep. Gallatin accused the House of unconstitutionally claiming a "power of defining the nature of petitions . . . [of claiming] that there are certain points which the people may not touch."[5]

Thus, in the first major constitutional crisis in American history, petitioning was the mechanism used by states, citizens and aliens to assert the priority of the constitution, and the people's claim to ultimate sovereignty. Ap-

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[2] The Virginia petition stated that normal petitioning procedures were to be followed: copies were to "be furnished to each of the senators and representatives representing this state in the Congress of the United States." 4 *Elliot's Debates on the Federal Constitution*, 529 (1876).

[3] Resident aliens deluged Congress with petitions protesting the provisions of the Alien Act and the Naturalization Act. *See* discussion in *D. Smith, The Right To Petition For Redress of Grievances: Constitutional Development And Interpretations* 117-18 (1971) (University Microfilms) (unpublished thesis).

[4] See, *e.g.*, 9 Annals of Congress 2934-35 (Feb. 20, 1799) (Rep. Livingston); *id.* at 2957-58 (February 22, 1799) (Rep. Bard); *id.* at 2959 (Feb. 22, 1799) (Rep. Gallatin).

[5] *Id.* at 2958. After this accusation, his motion to refer all the petitions to a select committee passed. *Id.* at 2959.

propriately, the object of these petitions were laws that themselves threatened the right to petition and the balance of power between government and the people.

Interference with the right to petition was also intimately associated with the constitutional crisis over slavery. Because petitioning was the principal way abolitionists attempted to influence governmental policy, "the problem of freed and fugitive slaves became intertwined with the right of petition." [6]

In 1790, the first petition seeking the abolition of slavery was presented to the House of Representatives.[7] Petions for the abolition of slavery continued to be filed over the next forty years, culminating in the 1830's with a massive petitioning campaign to abolish slavery in the District of Columbia.[8] The House of Representatives responded by passing a series of "gag rules," under which petitions concerning slavery were, "without being either printed or referred . . . laid upon table and . . . no further action whatever [could] be had thereon." Register of Debates 4052 (May 26, 1836). These rules, which were passed by successive Congresses until 1844, were vigorously attacked by the abolitionists, including John Quincy Adams: "I hold this resolution to be a direct violation of the Constitution of the United States, of the rules of this House, and of *the rights of my constituents.*" Register of Debates 4053 (May 26, 1836) (emphasis added). Typical of these attacks was that of Sen Morris:

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[6] *D. Smith, supra* n. 3, at 81.

[7] 2 Annals of Congress 1182-83 (Feb. 11, 1790). Benjamin Franklin, as President of the Pennsylvania Abolition Society, filed one of these early petitions.

[8] The dimensions of this campaign are startling: petitions containing more than 34,000 signatures were received by the House during the first session of the 24th Congress; that number increased to 110,000 in the second session, and to over 300,000 in the 1837-38 session. *D. Smith, supra* n. 3, at 98 (*citing H. Von Volst, The Constitutional and Political History of the United States* 284 (1888)).

> "Is not the right of petition a fundamental right? I believe it is a sacred and fundamental right, belonging to the people, to petition Congress for the redress of grievances. While this right is assured by the Constitution, *it is incompetent to any legislative body to prescribe how the right is to be exercised, or when, or on what subject*; or else this right becomes a mass mockery." [9]

These two examples from American constitutional history give concrete meaning to the Framers' understanding that petitioning is a direct expression of popular sovereignty parallel to, but outside, the legislative authority of Congress.

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[9] *I. Benton, Thirty Years View* 612 (1856), quoted in *D. Smith, supra* n. 3, at 95-96 (emphasis added). The proponents of slavery recognized the importance of the abolitionists' petitions:

> "The Senators from the slaveholding States, who most unfortunately have committed themselves to vote for receiving these incendiary petitions [to abolish slavery in the District of Columbia], tell us that whenever the attempt shall be made to abolish slavery, they will join us . . . . they are now called on to redeem their pledge . . . the war which the abolitionists wage against us . . . is a war of religious and political fanaticism . . . We must meet the enemy on the frontier, on the question of receiving [the petition]; we must secure the important pass—it is our Thermopylae." Register of Debates 774-75 (Mar. 9, 1836) (Sen. Calhoun).

Calhoun clearly recognized that if slavery was to be preserved, government would have to subvert the right to petiiton.

(5)

No. 84-476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT MCDONALD,

Petitioner,

—v.—

DAVID I. SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members, dedicated to defending the rights secured by the Constitution and laws of the United States. The ACLU has long been particularly interested in preserving those freedoms whose source is the First Amendment to the Constitution. The ACLU has participated, directly or as amicus curiae, in numerous First Amendment cases in the Court over the past decades.

This case raises the question whether an individual citizen may communicate privately with federal officials regarding matters of public concern, i.e., the qualifications of an applicant to a high federal office, without fear of having to defend that communication in an expensive and

lengthy libel action. The ACLU submits this brief amicus curiae to urge the Court to hold that in the circumstances of this case, the Petition Clause of the First Amendment provides the Petitioner, Mr. Robert McDonald, with an absolute defense to Respondent David I. Smith's action for libel.

The ACLU also urges that this Court seize the opportunity presented by this case to revisit the "actual malice" standard set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The ACLU believes that, as Judge Robert Bork of the District of Columbia Circuit Court of Appeals recently wrote, the New York Times v. Sullivan standard "seems not to have provided in full measure the protection for the marketplace of ideas that it was designed to do," and that "a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has

threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit." Ollman v. Evans, No. 79-2265 (D.C. Cir. Dec. 6, 1984) (Bork, J., concurring).

Twenty years of experience with the New York Times standard should lead this Court to hold that no governmental official or candidate for office may institute an action for libel premised upon allegedly defamatory statements if those statements relate to the official's public duties, acts, functions or responsibilities. Such a rule would fully realize the guarantees of freedom of speech,

freedom of the press, and freedom to petition that are contained in the First Amendment.[1/]

SUMMARY OF ARGUMENT

The First Amendment guarantees to each citizen the right to petition the government for the redress of grievances. The defendant and Petitioner here, Mr. Robert McDonald, was sued because he tried to exercise that right by communicating to the President of the United States his concerns about the qualifications of an applicant to a high federal position, Mr. David I. Smith.

The First Amendment precludes recovery by Smith in his defamation action against McDonald. The right "to have one's voice heard and one's view considered by the

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1/ Letters from all parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

appropriate government authority" is the very essense of democracy. Williams v. Rhodes, 393 U.S. 23, 41 (1968) (Harlan, J., concurring). The freedom to address one's government without fear of retribution benefits both the speaker and the recipient of the message, as this Court explained almost twenty-five years ago in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961):

> "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."

In granting absolute immunity from civil liability for statements made in connection with judicial proceedings, legislative proceedings, and quasi-judicial administrative proceedings as well as for statements made

to and by law enforcement officers regarding suspected criminal activity, this Court and the courts of most jurisdictions have demonstrated a practical concern for the fullest and freest possible flow of information vital to the adjudicatory and legislative functions. Because the petition to the government for the redress of grievances is functionally indistinguishable from the citizen's report regarding potential criminal activity, "for which no action of libel or slander will lie," In Re Quarles, 158 U.S. 532 (1895), the Court should hold that no civil liability may be premised upon bona fide petitioning activity.

The Court should also bar recovery by Smith against McDonald on the ground that no governmental official or candidate for office may seek recovery for reputational injuries if that recovery is based upon statements

relating to the official's public duties, acts, functions or responsibilities. The actual malice standard set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), has fallen short of providing the "breathing space" that First Amendment freedoms require in order to survive, for that standard has not prevented an alarming rise in libel suits intended to stifle political speech, nor has it eliminated the real danger of jury verdicts premised upon hatred for unpopular views and issued with near total disregard for precious First Amendment values.

The First Amendment grants to each citizen the right to criticize official conduct despite the harm that may flow from excess in the heat of debate. As Justice White has written, the "central meaning" of the First Amendment, "as it relates to libel laws, is that seditious libel -- criticism

of government and public officials -- falls beyond the police power of the state." Gertz v. Robert Welch, Inc., 418 U.S. 323, 388 (1974) (White, J., concurring).

ARGUMENT

I. THE PETITION CLAUSE OF THE FIRST AMENDMENT PROHIBITS THE IMPOSITION OF LIABILITY FOR ALLEGEDLY DEFAMATORY COMMUNICATIONS TO FEDERAL OFFICIALS CONCERNING APPLICANTS FOR FEDERAL OFFICE.

The First Amendment to the United States Constitution provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The right to "petition the Government for redress of grievances" is "among the most precious of the liberties safeguarded by the Bill of Rights." United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). This case involves a classic exercise of the right to petition, and it offers this Court an unparalleled opportunity to safeguard that most precious right. The plaintiff and Respondent here, David I. Smith, an unsuccessful applicant for a position as a United States Attorney in North Carolina, claims that letters sent by defendant and Petitioner Robert McDonald to the President of the United States and to certain other federal officers contained defamatory statements regarding Smith's professional qualifications. Smith's complaint also alleges, in conclusory language, that McDonald knew the statements in question were false

at the time he made them and that he acted out of malice and with "evil and wicked intent."

Simply put, the First Amendment's Petition Clause precludes recovery by Smith. A long line of federal and state decisions have held that the First Amendment bars civil liability premised upon bona fide petitioning activity. See, e.g., California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972) (petitions to administrative agencies and to courts cannot give rise to antitrust liability in absence of allegation that petitioning activity "effectively barr[ed] [plaintiff] from access to the agencies and courts"); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) (hereinafter "Pennington") (joint efforts to influence governmental action do not violate Sherman Act regardless of intent or purpose);

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961) (hereinafter "Noerr") (same); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980) (suit for damages under 42 U.S.C. §1983 dismissed because First Amendment right to petition for zoning change is absolute); Missouri v. National Organization For Women, Inc., 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980) (NOW boycott directed at Missouri absolutely privileged under Petition Clause); Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 542 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979) (writing to State Board of Medical Examiners to request investigation of possible violations of Medical Practice Act is protected petitioning activity); Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977), cert. denied, 434 U.S. 975 (1978)

(42 U.S.C. §1985(1) suit dismissed in part because Petition Clause provides defense to claims concerning complaints to an IRS agent's supervisor); Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977) (lobbying efforts directed against plaintiff's application to operate restaurant are protected by First Amendment); Weiss v. Willow Tree Civic Ass'n, 467 F.Supp. 803 (S.D.N.Y. 1979) (complaints based upon 42 U.S.C. §§1982, 1983 and 1985(3) dismissed because petitions to town officials were absolutely privileged); J.P. Stevens & Co., Inc. v. Maynard Jackson, et al., 85 Lab.Cas. [CCH] 10,980 (N.D.Ga. 1978) (defendants' boycotting and lobbying activities shielded by First Amendment from liability under 42 U.S.C. §1983); Aknin v. Phillips, 404 F.Supp. 1150, 1153 (S.D.N.Y.

1975) (protests to local officials regarding discotheque operation protected by right to petition); Sierra Club v. Butz, 349 F.Supp. 934, 935 (N.D.Cal. 1972) (lobbying efforts directed to Secretary of Agriculture protected by Petition Clause); Sherrard v. Hull, 456 A.2d 59, 63-67 (Md.App.), aff'd, 460 A.2d 601 (Md. 1983) (absolute privilege afforded petitioning activity which included allegations of bribery made at county hearing on zoning designation); Webb v. Fury, 282 S.E.2d 28 (W.Va. 1981) (lobbying efforts relating to government regulation of corporation's surface mining activities protected by Petition Clause); Matossian v. Fahmie, 101 Cal.App.3d 128, 161 Cal.Rptr. 532 (1980) (efforts to persuade Department of Alcoholic Beverage Control not to grant liquor license to plaintiff protected by First Amendment).

The analysis primarily employed in the above decisions is simple, straightforward, and convincing. In Noerr this Court explained that the right to petition is fundamental to our system of government:

> "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."

Noerr, 365 U.S. at 137.[2/]

In Stern v. United States Gypsum, Inc., 547 F.2d at 1342, the Seventh Circuit similarly concluded that "the right to

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2/ Although the Court in Noerr did not expressly ground its decision upon the Petition Clause, it noted in California Motor Transport Co., 404 U.S. at 510-511, that the Noerr holding was in fact based upon the right to petition.

petition is logically implicit in and fundamental to the very idea of a republican form of government." At issue in Stern were complaints of unprofessional conduct that had been lodged with an IRS agent's superiors by employees and officers of a company undergoing an IRS audit. The Court held that the defendants' communication of these complaints was a "classic" exercise of the right to petition:

> "We think it plain that presenting complaints to responsible government officials about the conduct of their subordinates with whom the complainer has had official dealings is . . . central to the protections of the right to petition."

Id. at 1343.

The Seventh Circuit in Stern concluded that there was "no doubt that the prospect of a federal lawsuit resulting from any citizen complaint about the conduct of federal

officials could chill the exercise of the right to petition." Id. Accordingly, the Court held that the defendants' constitutionally protected petitioning activities were privileged against any claim under §1985(1).

In the more recent case of Sherrard v. Hull, 456 A.2d 59 (Md.App. 1983), aff'd, 460 A.2d 601 (Md. 1983), the court held that a citizen's comments regarding zoning matters to a county board of commissioners could not constitutionally form the basis of a defamation action. After a lengthy review of the Noerr-Pennington line of cases, as well as decisions from state courts involving petitioning activities, the Sherrard court concluded that the "modern, better reasoned cases hold that true petitioning activity should be absolutely privileged." Id. at 70. "The decision we make today," the court

stated, "is founded upon the necessity of a legislative body to receive information enabling it to legislate. The right of petition is a necessary element of our representative government. . . ." Id.

The District Court in this case did conclude, quite properly, that McDonald's "alleged conduct falls within the general protection afforded by the petition clause of the first amendment." Smith v. McDonald, 562 F.Supp. 829, 838-839 (M.D.N.C. 1983). Nevertheless, the District Court held that McDonald was not entitled to the summary dismissal of Smith's claim because "Smith can prevail [at trial] provided he proves actual malice by McDonald." Id. at 843, citing New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964).

The District Court's application of the "actual malice" standard here is wholly inappropriate and contrary to logic and precedent. This Court protected petitioning activities in Noerr and in Pennington, for example, despite allegations and indeed findings that those activities were "malicious and fraudulent," Noerr, 365, U.S. at 133, and had an "illegal purpose," Pennington, 381 U.S. at 669. As Judge Zirpoli explained in Sierra Club v. Butz, 349 F.Supp. at 938, the application of an "actual malice" standard is insufficient protection for that "most precious" of liberties, the right to petition for the redress of grievances:

> "[T]he malice standard invites intimidation of all who seek redress from government; malice is easy to allege under modern pleading rules . . . and therefore in most cases even those who acted without malice would be put to the burden and expense of defending a lawsuit. Thus, the malice standard does not supply the 'breathing space' that

> First Amendment freedoms need to survive."

See also Stern v. United States Gypsum, Inc., 547 F.2d at 1345 ("It is easy enough to allege knowing falsity in a complaint and thus to avoid . . . a motion to dismiss. . . . Defendants . . . then would . . . face full-blown litigation. . . . This spectre alone could lead a citizen . . . contemplating the lodging of a good faith complaint to reconsider").

The "functional approach to immunity law" that this Court has regularly employed also supports the establishment of an absolute privilege for bona fide petitioning activity. Harlow v. Fitzgerald, 457 U.S. 800, 810 (1982). The Court's functional analysis has led it to recognize "that the judicial, prosecutorial and legislative functions require absolute immunity." Id. at 811. The

rationale for cloaking the prosecutorial function with absolute immunity, for example, was explained in Butz v. Economou, 438 U.S. 478, 518 (1978), as premised upon the fear that if prosecutors or even administrative agency attorneys "were held personally liable in damages as guarantors of the quality of their evidence, they might hesitate to bring forward some witnesses or documents." This same practical concern for the fullest and freest flow of information vital to the adjudicatory process has led many courts to hold that reports to law enforcement officers of suspected criminal activity are absolutely privileged.3/

3/ See, e.g., In Re Quarles, 158 U.S. 532, 535-536 (1895) (a private citizen's report to "executive officers" regarding potential criminal activity "is a privileged and confidential communication, for which no action of libel or slander will lie"); Rusack v. Harsha, 470 F.Supp. 285, 297 (M.D. Pa. 1978) (reporting "possible violations of

(footnote continued on next page)

There is no reason to place any higher priority on the goal of crime prevention and punishment than on the goal of attaining a

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(continued from previous page)

federal law" to federal officers is "constitutionally protected" and "cannot form the basis of a defamation action"); Cushman v. Edgar, 44 Or.App. 297, 605 P.2d 1210, 1212 (1980) (letter to Governor requesting investigation of alleged police brutality "was absolutely privileged as a report to a proper officer of government concerning alleged law violations. . . ."); McGranahan v. Dahar, 119 N.H. 758, 408 A.2d 121, 128 (1979) (". . . a person wrongfully accused of a crime must bear that risk, lest those who suspect wrongful activity be intimidated from speaking about it to the proper authorities for fear of becoming embroiled themselves in the hazards of interminable litigation"); Gabriel v. McMullin, 127 Iowa 426, 103 N.W. 355 (1905) (statements made to city attorney absolutely privileged on the ground that "[a] party having knowledge of facts tending to show that a crime has been committed will hesitate to lay such facts before the proper officer if the information thus given may be made the basis of an action for damages against him").

truly "representative democracy . . . [which] depends upon the ability of the people to make their wishes known to their representatives." Noerr, supra, 365 U.S. at 137. Accord, Sherrard v. Hull, 456 A.2d at 70 (founding absolute privilege for petitioning activity upon "the necessity of a legislative body to receive information enabling it to legislate").

The right "to have one's voice heard and one's view considered by the appropriate governmental authority" is the very essence of democracy, Williams v. Rhodes, 393 U.S. 23, 41 (1968) (Harlan, J., concurring). That right may not be conditioned by a state upon "the exaction of a price," Garrity v. New Jersey, 385 U.S. 493, 500 (1967), or "punishment," Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940), or "threat of criminal or civil sanctions," Nebraska Press Assn. v.

Stuart, 427 U.S. 539, 559 (1976), or, as here, by "a federal lawsuit," Stern v. United States Gypsum, Inc., 547 F.2d at 1343. This Court should therefore hold that Robert McDonald's letters to the President of the United States and his top aides cannot form the basis of a libel action by the allegedly defamed subject of those letters, David I. Smith.

II. THE COURT SHOULD HOLD THAT NO ACTION FOR LIBEL OR SLANDER MAY BE PREMISED UPON COMMUNICATIONS RELATING TO OFFICIAL ACTS, FUNCTIONS, OR RESPONSIBILITIES

As demonstrated in section I, above, David I. Smith's libel action against Robert McDonald presents to this Court an opportunity to provide substantial protection for that "most precious" of liberties, the right to petition for the redress of grievances. Mr. Smith's suit poses a broader question as

well: whether the First Amendment provides to a citizen an unconditional privilege to criticize his government and its officials.

In New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964), the Court held that a public official could recover in an action for libel upon proof that the defendant had published defamatory falsehoods with "actual malice." Twenty years of experience with the New York Times standards and its shortcomings have established that, as Justice Black had warned,

> "[t]he requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."

Id. at 293 (Black, J., concurring).

The past few years have seen a remarkable increase in libel actions, with a corresponding and even more remarkable increase in libel actions brought by public officials against those who dare to criticize official acts and policies. In a recent magazine article, reporter Anthony Lewis noted, for example, that Senator Paul Laxalt has sued the McClatchy Newspapers for two hundred and fifty million dollars over an article that reported allegations linking Laxalt to illegal "skimming" of Nevada casino revenues; that former Israeli Defense Minister Ariel Sharon has brought a fifty million dollar libel suit against Time Magazine over an article describing Sharon's role in the Sabra and Shatila massacres in Lebanon; and that General William C. Westmoreland is seeking one hundred and twenty million dollars in damages from CBS in a libel action stemming

from a CBS documentary on the Vietnam war. See Lewis, "Annals of Law: the Sullivan Case," The New Yorker, November 5, 1984, pp. 84-85. Lewis could have also listed Massachusetts Governor Edward J. King's 1.8 million dollar libel suit against the Boston Globe, which charged that a number of articles, editorials and political cartoons in that newspaper had libeled Gov. King. "Suit Against Globe Stands," New York Times, April 3, 1983, at 30, col. 4. Mr. Lewis concludes that "the novel phenomenon of libel actions by high public officials raises special concern," in part because "the American tradition is to the contrary." Lewis, supra, at 85, 90.

Concern over the recent increase in multimillion dollar libel actions involving public affairs is not limited to such longtime supporters of press freedom as Mr. Lewis.

In his concurrence to the recent decision by the D.C. Circuit in Ollman v. Evans, No. 79-2265 (D.C. Cir. December 6, 1984) (available December 27, 1984 on LEXIS, Genfed library, Cir file), Judge Robert Bork commented that "a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectivley inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit." Judge Bork concluded that the 'actual malice' standard laid down in New York Times "seems not to have provided in full measure the protection for the marketplace of ideas that it was designed to do." Id.

For a number of reasons, the actual malice standard has indeed fallen short of providing the "breathing space" that First

Amendment freedoms require in order to survive. First, by premising liability upon a determination of the defendant's state of mind, the actual malice standard sharply increases the likelihood that libel actions will proceed to trial without summary adjudication. As this Court noted in Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979), the question of a party's motive "does not readily lend itself to summary disposition." As a result, even those libel defendants who in good faith exercise their constitutional rights to criticize or comment upon public affairs or official actions or policies can be put to the burden and expense of defending a lawsuit through lengthy trial and appellate proceedings. Second, and as Judge Bork points out, "the evidence is mounting that juries do not give adequate attention to limits imposed by the first

amendment and are much more likely than judges to find for the plaintiff in a defamation case." Ollman v. Evans, supra (Bork, J., concurring).4/

Thus, the actual malice standard not only prolongs the expense and burden of a libel action, but by allowing such actions to reach juries almost as a matter of course, the standard increases the danger of verdicts issued with near total disregard for precious First Amendment values and freedoms.

4/ Interviews with five of the six jurors charged with deciding William Tavoulareas' libel action against the Washington Post, for example, revealed that that jury, which awarded Tavoulareas over two million dollars in compensatory and punitive damages, never even discussed the 'actual malice' standard and its application to that case, despite the trial judge's instructions to the contrary. Brill, "Inside The Jury Room at The Washington Post Libel Trial," The American Lawyer, Nov., 1982, at 1, 93-94.

Third, and most important, permitting a public official or candidate for office to recover damages from a citizen who has criticized, with or without malice, recklessly or not, the official's actions, qualifications, or policies is totally repugnant to the First Amendment's promise of freedom. The First Amendment "presupposes that the freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself--but also is essential to the common quest for truth and the vitality of society as a whole." Bose Corporation v. Consumers Union of United States, Inc., ___ U.S. ___, 104 S.Ct. 1949, 1961 (1984). Freedom to speak one's mind about the conduct of government, moreover, is the very essence of democracy. As Justice Black explained in his concurrence to New York Times:

> "To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. 'For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.'"

376 U.S. at 297, quoting 1 Tucker, Blackstone's Commentaries 297 (1803).

Justice Roberts had struck a similar chord almost twenty-five years before in his landmark opinion in Cantwell v. Connecticut:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been or are prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."
>
> Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

History joins with this logic to compel the conclusion that no civil liability may be premised upon criticism of officials and their actions. There is no longer any question that, as Justice White has written, "seditious libel . . . falls beyond the police power of the state." Gertz v. Robert Welch, Inc., 418 U.S. 323, 388 (1974) (White, J.,

concurring). Congress' sole attempt at codifying the notion of seditious libel, the Sedition Act of 1798, was recognized as unconstitutional shortly after its passage. The Sedition Act made it a crime to "defame . . . or to bring . . . into contempt or disrepute" the government of the United States or certain of its officials. This attempt to stifle political speech, which by its terms punished only criticisms that were both false and made with malicious intent, has "generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment." New York Times v. Sullivan, 376 U.S. at 296 (Douglas, J., concurring). As Justice Brennan explained for the Court in New York Times,

> "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the

> ground that it was unconstitutional."

New York Times v. Sullivan, 376 U.S. at 276 n.16. See also Rosenblatt v. Baer, 383 U.S. 75, 81 (1966) (the Constitution does not tolerate "prosecutions for libel on government . . . in any form.").

Seditious libel becomes no more palatable, and no more constitutional, moreover, when it arms itself with the power to levy civil fines rather than prison terms. "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." New York Times v. Sullivan, 376 U.S. at 277. Indeed, civil actions--with their lesser burdens of proof and potential for enormous damage awards--pose "hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Consequently, because those citizens who dare to criticize official acts or actors may not constitutionally be criminally prosecuted for their criticisms, malicious or not, those same critics--whether CBS or Robert McDonald--may not constitutionally be forced to bear liability in, or the costs of defense of, a civil libel suit.

The First Amendment affords each citizen an absolute, unconditional privilege to criticize official conduct despite the harm that may flow from excess in the heat of debate. That is the First Amendment's paramount guarantee. As Justice White has written, the "central meaning" of the First Amendment, "as it relates to libel laws, is that seditious libel--criticism of government and public officials--falls beyond the police

power of the state. In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials." Gertz, 418 U.S. at 388 (White, J., concurring).

CONCLUSION

For all the foregoing reasons, the decision of the court below should be reversed. The Petition Clause of the First Amendment stands as an absolute bar to civil liability premised upon bona fide petitioning activities such as tnose engaged in by the Petitioner here. The Court should also hold that no government official or candidate for government office may institute an action for libel premised upon allegedly defamatory statements if those statements relate to the official's public duties, acts, functions, qualifications, or responsibilities, for only

such a rule will fully realize the promise of freedom contained in the First Amendment.

DATED: January 23, 1985

Respectfully submitted,

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No. 84-476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT MCDONALD,

Petitioner,

v.

DAVID I. SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Can a defendant, who knowingly makes a false statement about an applicant for a Presidential appointment, rely on any privilege provided by the Petition Clause of the First Amendment, even though the statements were published to persons unrelated to the formal appointment process and, if so, is the applicable privilege qualified or absolute?

2. If such a defendant can rely on the privilege but it is not absolute, should this Court now consider whether the Petition Clause requires increased procedural protections, including judicial discretion to award costs and legal fees to a defendant if he ultimately prevails?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In July 1981, Respondent David I. Smith sued Robert McDonald in state court for libel. J.A. 1, 3-7. Smith based his allegations upon two letters, opposing Smith's appointment as United States attorney for the Middle District of North Carolina, written by McDonald on or about December 1, 1980, and February 13, 1981. J.A. 4-5.

McDonald removed the case to federal court, based upon diversity of citizenship. After an unsuccessful summary judgment motion, McDonald answered and moved

for judgment on the pleadings, claiming an absolute privilege from any libel action pursuant to the Petition Clause of the First Amendment. Defendant's Motion for Judgment on the Pleadings Pursuant to Rule 12(c) (July 9, 1982); Defendant's Memorandum in Support of Motion for Judgment on the Pleadings (July 9, 1982). The District Court denied the motion. Petition for Certiorari, App. B (opinion of District Court). McDonald was allowed to appeal and the Fourth Circuit affirmed the denial. *Id.* App. A (opinion of the Fourth Circuit).

The Complaint alleges that McDonald published the letters "kn[owing] that the statements were false," "maliciously," "in reckless disregard to [Smith's] rights and without regard to the truth and with an utter lack of good faith." J.A. 4-7. The letters falsely accused Smith of the following conduct:

> (a) violating the civil rights of various individuals while a Superior Court Judge:
>
> (b) unlawfully imprisoning persons while he was a Superior Court Judge;
>
> (c) criminal contempt;
>
> (d) fraud and conspiracy to commit fraud;
>
> (e) extortion or blackmail;
>
> (f) perjury and subordination of perjury;
>
> (g) professional misfeasance and malfeasance as a practicing attorney and as a Judge of the Superior Court of North Carolina;
>
> (h) violations of the codes of ethics promulgated and adopted by the American Bar Association and the North Carolina Bar Association;
>
> (i) wrongfully withholding evidence from the court in actions where he appeared as an attorney;
>
> (j) violating direct orders of the court in the trial of actions in which he appeared as an attorney;

(k) violations of professional ethics and dishonesty;

(l) of being a liar and a cheat; and

(m) professional misconduct as a Judge of the Superior Court and as a practicing attorney.

J.A. 5-6.

The Complaint alleges that the first libelous letter, dated December 1, 1980, was published to Ronald Reagan, Edwin Meese, Rep. Barry M. Goldwater, Jr., and Rep. Jack Kemp, and to the offices and staffs of Senator Jesse Helms and W. E. Johnson. J.A. 4. The Complaint alleges that the second libelous letter, dated February 13, 1981, was published to President Ronald Reagan, Edwin Meese, Rep. Barry Goldwater, Jr., Senator Jesse Helms, William Webster, and to the office and staff of Rep. W. E. Johnson. J.A. 5. The Complaint further alleges that the letters were read by those and others. J.A. 5, 6. McDonald did not provide Smith with copies of the letters.

The Complaint alleges that these letters contained malicious, knowing falsehoods. "At this stage of the litigation," this Court, "must accept [the Complaint's] allegations as true." *Hishon v. King & Spalding*, 104 S.Ct. 2229, 2233 (1984). McDonald, however, does not appear to recognize that constraint. *See, e.g.*, Brief for Petitioner 2-5 & nn.4, 5, 41 nn.69, 70, 43 n.77 (Jan. 24, 1985) (Petitioner's Brief). In his attempt to argue facts other than the allegations of the Complaint, McDonald claims that "the letters provided, on their face, a ready means for evaluating the truth of most of the statements contained therein by supplying names, addresses, and telephone numbers of persons present at the time, and citations to court records and newspaper articles." *Id.* at 2 n.4. Suffice it to say that resort to those listed sources disproves McDonald's statements and proves McDonald's reckless disregard for the truth. These are matters of proof and Smith readily accepts his burden at trial.

McDonald does not claim that the allegations of the Complaint are insufficient in any regard, absent an absolute privilege under the Petition Clause. Smith denies that the Petition Clause affords any absolute privilege and submits that McDonald waived any available Petition Clause privilege by misdirecting the libel.

SUMMARY OF ARGUMENT

In *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964), this Court ruled that the speech and press clauses of the First Amendment afforded qualified immunity, but not absolute immunity, from actions brought by public officials pursuant to state libel law. McDonald risked liability for his alleged malicious falsehoods under the *New York Times* standard; in his effort to avoid responsibility for his words, therefore, he requests this Court to provide greater protection for his secret letters than the Constitution provides for open, public debate of important government issues. He seeks absolute immunity under the Petition Clause of the First Amendment for secret, malicious falsehoods.

Free speech concerning public affairs is the "essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). McDonald denies that free speech is any part of self-government. Rather, he claims that "petitioning, *unlike speech*, is a direct exercise of a self-governmental function . . . ." Petitioner's Brief at 8 (emphasis added). By denying the self-governing function of free speech, McDonald attempts to elevate communications to the servants of the people, government officials, to a higher status than communications among the people, the holders of "absolute sovereignty." *New York Times*, 376 U.S. at 274 (quoting James Madison).

Granting absolute immunity to secret petitions would have far graver effects than allowing McDonald to avoid responsibility for his words or leaving Mr. Smith un-

compensated for his injuries. Absolute immunity for petitions would encourage discussion of public affairs to move out of the light of wide-open, public discourse and into the shadows of secret "petitions." The critic would thereby avoid responsibility for lies and, by secrecy, avoid the occasion of having his lies met with truth.

Nothing in the history of libel, the history of petitioning, the history of the First Amendment, the decisions of this Court, or the circumstances of this case invites skewing the First Amendment to provide absolute protection to secret, malicious lies, simply because they are directed to government officials. And even if such communications should receive absolute immunity from liability for defamation, McDonald waived any such protection for his letters by directing them inappropriately.

Finally, McDonald's arguments regarding procedural protections offend the same First Amendment values as his argument for absolute immunity, and these arguments are not properly before this Court.

ARGUMENT

I. SECRET MALICIOUS LIES ARE MORE OFFENSIVE TO THE FIRST AMENDMENT THAN PUBLIC MALICIOUS LIES, AND DESERVE NO GREATER PROTECTION.

McDonald is not before the Court defending the value of public debate of governmental issues. Rather he seeks absolute protection for the behavior alleged in the Complaint, knowingly false secret "petitions," [1] which were efforts to marshall clout to harm David Smith. Such secret falsehoods, by their nature, stand apart from the free discussion of governmental affairs that is "indispensable to decisionmaking in a democracy." *First Na-*

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[1] McDonald describes his secret "petitions" as "private." Petitioner's Brief at 7.

tional Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

The absolute immunity that McDonald seeks would obstruct the public discussion in the "marketplace of ideas," *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), that the First Amendment was fashioned to protect.

A. Secret, Malicious Lies Pervert First Amendment Values by Obstructing the Search for Truth.

The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943) (opinion by Learned Hand, J.).

This Court has declared our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open . . . ." *New York Times*, 376 U.S. at 270. That debate is not limited to truth, because "[e]ven a false statement may be deemed to make a valuable contribution to *public* debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' " *Id.* at 379 n.19 (quoting Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15) (emphasis added). Public debate, however, is limited; it excludes false statements made with " 'actual malice'—that is, with knowledge that it [is] false or with reckless disregard of whether it [is] false or not." *Id.* at 280.[2]

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[2] McDonald admits that knowing, false statements do not serve the interest of competition for the truth protected by the free speech and press clauses and that such statements do not serve the search for truth when hidden in secret petitions. Petitioner's Brief at 44 n.78. He relies instead on the status of petition as self-government, a status which he, but not the Constitution, denies speech. *Id.*

McDonald would have the Court declare a rule that would narrow the scope of public debate by encouraging critics of government to seek the absolute immunity of a secret petition. Such a rule would shield discussion of governmental affairs from the bright light of the marketplace of ideas and from other truth-seeking devices built into our system of government.

Marketplace of ideas. "Those who won our independence believed . . . in the power of reason as applied through *public* discussion . . . ." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added). That "power of reason" results from "the robust exchange of ideas and information which is essential to our way of life." *Webb v. Fury*, 282 S.E.2d 28, 47 (W.Va. 1981).

Secret petitions are not counted among Judge Learned Hand's "multitude of tongues." They do not "inform[] the public," *First National Bank v. Bellotti*, 435 U.S. at 777, nor are they any part of the marketplace of ideas.

Opportunity to respond.[3] "[R]egular and continuing access to the media . . . is one of the accouterments of having become a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979). That access is among the reasons for the lesser protection from libel provided to public figures. "Public officials and public figures usually enjoy significantly greater access to the channels of effec-

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[3] Cases relied on by McDonald as supporting his claim of absolute privilege not only addressed fact situations where opportunity to respond was provided, but also appear to have relied on the existence of that opportunity. *See, e.g., Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1344 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978) ("[T]he protective machinery of due process hearings is available, with full opportunity to refute that which is unfounded."); *Webb v. Fury*, 282 S.E.2d 28, 39 (W. Va. 1981) ("[R]espondent had ample opportunity to participate in the investigations . . . ."). Smith was guaranteed no such opportunity outside this action.

tive communication and *hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.*" *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 344 (1974) (emphasis added).

Media access does not provide any "reasonable opportunity to counteract false statements" that are secretly made. One reason for affording public figures less protection from libel, therefore, simply does not apply to secret petitions.

Other protections. Secret petitions also avoid other truth-seeking protections. McDonald argues that, "[i]f there had been a hearing, [he] could have read the contents of his letters into the public record and he would have enjoyed complete immunity." Petitioner's Brief at 33. He neglects, however, to discuss the controls, other than libel suits, that would have applied to such testimony. McDonald would have been under oath and subject to criminal penalties for perjury. *See, e.g., United States v. Norris*, 300 U.S. 564 (1937). Although Smith would have had no opportunity to cross-examine him, members of the Senate Judiciary Committee would have had that opportunity. Further, Smith would have had opportunity to respond formally to the charges before the committee.

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The resulting "public access to discussion, debate, and the dissemination of information and ideas," *First National Bank v. Bellotti*, 435 U.S. at 783, serves the search for truth.

> Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for

> arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

Providing greater protections for secret petitions than for unrestrained, vigorous, public debate would avoid the marketplace of ideas and other truth-seeking devises, defeating a central value of the First Amendment. The First Amendment was not designed to avoid truth; the Constitution provides no absolute immunity from libel for secret petitions.

B. Because Secret Petitions are Less Fundamental to Self-government than is Open Debate of Public Issues, They Deserve No Greater Protection than New York Times Provides Speech.

" 'The people, not the government, possess the absolute sovereignty' " *New York Times*, 376 U.S. at 274 (quoting James Madison). "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." *Id.* at 275. Citizens, as self-governors, have a "duty to criticize," and the Constitution protects that duty as free speech. *Id.* at 282.

Public debate was recognized as a duty of self-government from the earliest days of the Republic. "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. at 375 (Brandeis, J., concurring). It "has long been settled" by the decisions of this Court that the Constitution protects such discussion as free speech. *New York Times*, 376 U.S. at 269. "[S]peech concerning public affairs is more than self-

expression; it is the *essence of self-government.*" *Garrison v. Louisiana*, 379 U.S. at 75 (emphasis added).[4]

McDonald denies that the "essence of self-government" is self-government at all.[5] Petitioner's Brief at 7, 8, 30.[6] Upon that denial rests his argument for absolute immunity.

James Madison believed "that the censorial power is in the people over the government, and not in the Government over the people." 4 Annals of Congress 934 (1794). If that principle has meaning, communication among the people, the "essence of self-government," must not be relegated to a position inferior to secret petitions. The newly-established American "form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects." *New York Times*, 376 U.S. at 274. Here the sovereignty is in the people; they are the highest authority to which appeal on public issues may be had.[7] The government, to

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[4] "The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government." Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 252 (1961).

[5] For instance, McDonald argues that "the right to petition establishes a checking balance between the people-at-large and government." Petitioner's Brief at 27. This Court has recognized, in a free press case, "the function of the First Amendment as a check on legislative power." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). Thus, the checking function of the First Amendment is not limited to petitioning.

[6] "Petitioning, *unlike speech*, is a direct exercise of a self-governmental function . . . ." Petitioner's Brief at 8 (emphasis added); *id.* at 7 ("Unlike the more general freedoms of speech and press, the right to petition was understood by the Framers of the Constitution and the First Amendment to be a necessary right of a self-governing people.").

[7] The sovereign people refrained from delegating all power to the government. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

which McDonald would allow publication of malicious lies, "govern[s] us, [but] we, in a deeper sense govern them." Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 257 (1961).

Self-government, be it speech or petition, is not served by the knowing, malicious falsehood McDonald is alleged to have published.

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration . . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . ." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U.S. at 75 (citations omitted); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966) ("[M]alicious libel enjoys no constitutional protection in any context.").

The Court, in *Garrison*, set out the "underpinning" of the *New York Times* holding that the First Amendment "does not bar civil or criminal libel actions for false criticism of the official conduct of a public official if that criticism is made with knowledge of its falsity or in reckless disregard of whether it was false or true." Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv.L.Rev. 1, 18 (1965) (hereinafter *Brennan on Meiklejohn*).

Free speech is self-government. McDonald, therefore, has no basis for any claim to greater protection than *New York Times* affords. Examination of McDonald's "fair equivalent" argument readily exposes its misinterpretation of *New York Times*.

McDonald cites *New York Times* as providing a qualified immunity to free speech and press as the " 'fair equivalent of the immunity granted to the officials themselves.' " Petitioner's Brief at 29 (quoting *New York Times*, 376 U.S. at 283). He continues: "when the citizen is not speaking to the public at large, but is directly exercising his right to petition, and is thus performing a self-governmental function" absolute immunity is required. *Id.* at 30. This Court, however, considered the speech in *New York Times* to be self-government. *New York Times*, 376 U.S. at 282 ("It is as much his duty to criticize as it is the official's duty to administer.").

In *New York Times*, this Court balanced the very considerations McDonald now argues. It determined that the "fair equivalent" of the government official's immunity is a qualified immunity for the self-governing citizen.[8] The Constitution requires no more protection for

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[8] McDonald makes much of absolute immunities provided government officials, and especially of *New York Times*' citation to *Barr v. Matteo*, 360 U.S. 564 (1959). *See* Petitioner's Brief at 29. *New York Times*, however, holds that qualified immunity is "appropriately analogous to the protection accorded a public official

the self-governing petitioner than it requires for the self-governing speaker.

C. This Court has Protected the Right to Petition While Neither Providing Absolute Immunities Nor Applying Analysis Different from that Applied to Other First Amendment Rights.

This Court has not provided unique protections to speech contained in petitions and has consistently applied the identical analysis to speech, assembly, and petition.[9] The Court has carefully examined the relationship among these rights in providing a unified approach to their exercise and to attempts at regulation.

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. . . . They are cognate rights, . . . and therefore are united in the First Article's assurances.

Thomas v. Collins, 323 U.S. 516, 530 (1945) (citations omitted).[10]

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when *he* is sued for libel by a private citizen," and goes on to discuss various levels of immunity provided to public officials. *New York Times*, 376 U.S. at 282. *New York Times*, therefore, determined what sort of immunity would be equivalent to the various immunities available to government officials in different circumstances.

[9] McDonald presents a semantic argument, distinguishing between the "freedoms" of speech and press as opposed to the "right" to petition. Petitioner's Brief at 10 n.10. This Court has not recognized any such distinction. Furthermore, the First Amendment also describes assembly as a "right" rather than a "freedom," and the Constitution affords no absolute protections to assembly.

[10] McDonald's argument that applying the same constitutional standards to petition and speech would reduce the Petition Clause to "mere surplusage," Petitioner's Brief at 47, ignores both the

The Court has recognized the relationship among these rights in a number of contexts. Addressing the NAACP's cooperative efforts to seek judicial redress of grievances, the Court stated:

> We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity.

NAACP v. Button, 371 U.S. 415, 430 (1963).

Similarly, in examining union activities, the Court has not distinguished among these rights; the presence of Petition Clause protections has required no different analysis. "It cannot seriously be doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them . . . ." *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1, 5 (1964); *see United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) (addressing petitioning with, and no differently from, speech and association); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971).

Congressional regulation of lobbying was found not to violate "the freedoms guaranteed by the First Amend-

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principle stated in *Thomas* and at least one early decision of this Court. In *Crandall v. Nevada*, 73 U.S. 35 (1867), a state tax on persons leaving the state on public transportation was held violative of the right to go to Washington, D.C., to *petition* the national government. *Id.* at 44. That decision belies McDonald's claim that "[a]ll petition is speech, but not all speech is petition." Petition for a Writ of Certiorari at 18.

ment—freedom to speak, publish, and petition the Government," without requiring separate analysis of the freedom to petition. *United States v. Harriss*, 347 U.S. 612, 625-26 (1954). *See Reagan v. Taxation With Representation*, 461 U.S. 540 (1983) (examining lobbying as a general First Amendment right).

Similarly, the petition aspects of civil rights demonstrations have been recognized, but they have not required analysis different from that applied to the speech, assembly, and association aspects of the demonstrations. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) ("The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'"); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (The demonstrations "reflect an exercise of these basic constitutional rights [free speech, free assembly, and freedom to petition for redress of grievances] in their most pristine and classic form."); *see Adderley v. Florida*, 385 U.S. 39, 48-56 (1966) (Douglas, J., dissenting).

Significantly, in none of these cases did the Court consider the presence of a Petition Clause right to require any special approach different from that required by other aspects of the First Amendment. Were some absolute immunity associated with petitioning, a different analysis—or no further analysis at all—would have been required. For example, in *Claiborne Hardware*, the Court said:

> The presence of protected activity [including petitioning], however, *does not end the relevant constitutional inquiry.*

Id. at 912 (emphasis added). The Court proceeded to evaluate whether a competing state interest could justify infringing the rights of speech, assembly, association, and *petition*. *Id.* at 912-15 (especially at 914). Were peti-

tions absolutely immune from state tort liability, no such analysis would have been necessary or appropriate.[11]

D. No Balancing of Interests Requires Absolute Immunity for Intentional Lies in the Form of Speech or Petition.

McDonald invites the Court to balance federal and state interests to find secret petitions absolutely immune from liability for defamation. Petitioner's Brief at 35-47. Yet, resort to balancing precludes a finding of absolute immunity. "The . . . 'balancing' test[] recognize[s] some governmental power to inhibit speech . . . ." *Brennan on Meiklejohn*, 79 Harv.L.Rev. at 11. Furthermore, the Constitution provides no weight to malicious falsehoods when

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[11] In 1983, the Court shed light on the rationale of several cases involving the Petition Clause that had not appeared to apply analysis used in other First Amendment contexts. Earlier, the Court had established that, although Congress did not intend the antitrust laws to regulate petitioning activity, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961), some petitioning behavior, although "part of the right of petition," was "not necessarily . . . immun[e] from the antitrust laws." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (applying the "sham exception" from *Noerr*). Then, in 1983, the Court ruled that "baseless litigation" in state Courts is subject to regulation pursuant to National Labor Relations Act. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). In *Bill Johnson's Restaurants*, the Court provided:

> Just as false statements are not immunized by the First Amendment right to freedom of speech, . . . baseless litigation is not immunized by the First Amendment right to petition.
>
> . . . .
>
> Considerations analogous to these led us in the antitrust context to adopt the "mere sham" exception . . . .

Id. at 743-44 (citations omitted). If the Petition Clause does not make petitioning absolutely privileged from federal regulations "[j]ust as" the Speech Clause does not make speech absolutely immune from state regulation, surely the Petition Clause does not make petitioning absolutely immune from state regulation.

balanced against any legitimate competing interest. *Garrison v. Louisiana*, 379 U.S. at 75 ("calculated falsehood" is no part of protected expression).

Proponents of absolute immunity derived from the First Amendment have recognized that the claim of absolute immunity and the balancing of competing interests are mutually exclusive concepts.

In any event, as Justice Brennan observed, "the absolutist view [of the First Amendment prohibitions] has not prevailed within the Court." *Brennan on Meiklejohn*, 79 Harv.L.Rev. at 5.[12] Rather, the Court, over the objections of First Amendment absolutists, has used various "limiting tests," including the "so-called balancing test," *id.* at 9, that McDonald proposes here. *See Gertz v. Robert Welsh, Inc.*, 418 U.S. at 356 (Douglas, J., dissenting); *New York Times*, 376 U.S. at 293 (Black, J., dissenting);[13] *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) ("The First Amendment, its prohibition in absolute terms, was designed to preclude courts as well as legislatures from weighing the values of speech against silence."); *see also Brennan on Meiklejohn*, 79 Harv.L.Rev. at 11 ("Dr. Meiklejohn would have none of [the Court's tests, including balancing.]").

McDonald, however, resorts to weighing values even as he calls for absolute immunity. Petitioner's Brief at 35-47. Having done so, he is limited to the weight the Constitution affords the knowing falsehoods he defends. The Constitution provides such communications *no weight* and no protection. *Herbert v. Lando*, 441 U.S. 153, 171 (1979); *Gertz v. Robert Welsh, Inc.*, 418 U.S. at 340;

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[12] *See, e.g., Cohen v. California*, 403 U.S. 15, 19 (1971); *Breard v. Alexandria*, 341 U.S. 622, 642 (1951).

[13] "Probably Mr. Justice Black has been the most eloquent and persuasive proponent of the [the absolutist] view." *Brennan on Meiklejohn*, 79 Harv. L. Rev. at 4.

Garrison v. Louisiana, 379 U.S. at 75; *New York Times*, 376 U.S. at 279-80.

McDonald misconstrues the federal interests in his attempt to give weight to knowing falsehoods. The Court has considered the possible chilling effect the specter of civil liability may have on expression and decided that a defense of truth alone was inadequate and "inconsistent with the First and Fourteenth Amendments." *New York Times*, 376 U.S. at 279 (A truth defense alone "dampens the vigor and limits the variety of public debate.") The Constitution protects against any "chilling effect" by the *New York Times* malice requirement. *Id.* at 279-80. The potential cost of defending a libel action is great, but neither the cost nor its "chilling effect" is greater where the lies are published in secret letters rather than in the New York Times. *Compare New York Times with* Petitioner's Brief at 36-40.

Similarly, the occasion to call upon federal officials to participate in discovery is not peculiar to defamation actions. *See* Petitioner's Brief at 40-42. Indeed, had McDonald's letters been even more broadly published, the discovery to which he objects might well be relevant.

The other "interests" upon which McDonald relies, Petitioner's Brief at 43-45, relate to protecting the flow of knowing, malicious falsehoods to the government. Of course, such communications interfere with, rather than contribute to, the functions of government.[14] The provisions of *New York Times* appropriately address any "chilling effect" on that flow of information.

McDonald understandably fails to mention competing interests other than the state's interest in protecting the

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[14] Positions taken by the national government in the course of litigation do not all support immunity for petitioning. *Compare* Petitioner's Brief at 39-40 & n.68 *with Sure-Tan, Inc. v. NLRB*, 104 S.Ct. 2803 (1984) (informing Immigration and Naturalization Service of status of illegal alien workers found to be unfair labor practice under National Labor Relations Act).

reputation of its citizens. Petitioner's Brief at 45. Other interests, however, outweigh protecting the secret communication of malicious falsehoods. For instance, "[t]he function of libel suits in preventing violence has long been recognized." *Linn v. United Plant Guard Workers*, 383 U.S. at 64 n.6. Furthermore, the rule sought by McDonald would exacerbate the existing disincentive to public service already resulting from public disclosure statutes and confirmation hearings.

Although the competing interests need not be strong to outweigh any interest in knowing, malicious falsehood (especially when secretly communicated), the strength of the interests implicated here has long been recognized by this Court.

> The legitimate state interest underlying the law of libel is the compensating of individuals for the harm inflicted upon them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name
>
> > "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

Gertz v. Robert Welsh, Inc., 418 U.S. at 341 (quoting and adopting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)); *Rosenblatt*, 383 U.S. at 86 ("[I]mportant social values . . . underlie the law of defamation."); *Time, Inc. v. Firestone*, 424 U.S. 448, 471 (1976) (Brennan, J., dissenting).

North Carolina recognizes and protects that "basic of our constitutional system." Its constitution provides that

"every person for an injury done him in his . . . reputation shall have remedy by due course of law . . . ." N.C. Const. art. I, § 18. That is not to say that North Carolina law provides a remedy for all defamatory falsehoods; it does not. North Carolina was among the states whose limitations on libel were looked to by the Court in formulating the *New York Times* standard. *New York Times*, 376 U.S. at 280 n.20 (citing *Ponder v. Cobb*, 257 N.C. 281, 299, 126 S.E.2d 67, 80 (1962)).[15]

Since *New York Times*, this Court "has reiterated its conviction—reflected in the laws of defamation of all the States—that the individual's interest in his reputation is . . . a basic concern." *Herbert v. Lando*, 441 U.S. at 169; *Time, Inc. v. Firestone*, 424 U.S. at 456 (emphasis added) ("accommodation between the public's interest in an uninhibited press and its *equally compelling* need for judicial redress of libelous utterances"); *Gertz v. Robert Welsh, Inc.*, 418 U.S. at 348-49.[16] McDonald too lightly casts the Court's "conviction" aside, arguing only public interest concerns that this Court fully addressed by the protections provided speech, without resort to absolute immunity. *See* Petitioner's Brief at 45-46; *New York Times*.[17]

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[15] Interestingly, *Ponder v. Cobb* involved the state court recognizing only a qualified immunity from defamation for criticism of state election officials contained in letters sent to state officers.

[16] Indeed, the Court has facilitated efforts to obtain redress for libel. *See, e.g., Calder v. Jones*, 104 S.Ct. 1482 (1984) (allowing California state courts to exercise jurisdiction over Florida defendants); *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984) (allowing libel plaintiff to prosecute action against non-resident defendant); *Herbert v. Lando*, 441 U.S. 153 (1979) (subjecting editorial process and state of mind of defendant to discovery by libel plaintiff).

[17] Reputation is included within the concept of "liberty" protected from government intrusion by the Fourteenth Amendment. *See* Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405 (1977); *cf. Paul v. Davis*, 424 U.S. 693 (1976).

McDonald's balancing-of-interests argument fails to provide any support for treating his letters any differently as a petition from the way they would be treated as speech. He merely proposes interests that this Court has found to be adequately protected by free speech analysis and ignores the fact that the federal interests he seeks to protect is in malicious falsehood, which traditionally has been afforded no weight. Most revealing, perhaps, is that he found it necessary to make a balancing test argument, which is necessarily inconsistent with any claimed constitutional guarantee of absolute immunity.

Carefully directing malicious falsehoods to powerful federal officials in a position to cause the greatest resulting harm should not be held out as a safe harbor to those "unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool." *Garrison v. Louisiana*, 379 U.S. at 75.

II. THE FRAMERS' UNDERSTANDING OF COMMON LAW LIABILITY FOR INTENTIONAL FALSEHOODS PUBLISHED AS NON-JUDICIAL PETITIONS PROVIDES NO SUPPORT FOR A CLAIM OF ABSOLUTE PRIVILEGE FROM LIBEL ACTIONS BASED ON THE PETITION CLAUSE.

The record of both recovery of damages for defamation and petitioning the sovereign for redress of grievances extends far into our history, as far, in fact, as records of our history extend.[18] The relevance of historical information to the issue before the Court is limited to the history of the relationship between the two rights.

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[18] *Compare* Petitioner's Brief at 11-16, *and* Petition for Certiorari at 17-18 & nn.19, 20, *with V. Veeder, The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 549 (1903) ("More than a thousand years ago King Alfred provided that the slanderer should have his tongue cut out, unless he could redeem it with the price of his head."); *see* Exodus 20:15 ("Thou shalt not bear false witness against thy neighbor.").

The extent to which members of Parliament could, or could not, face criminal liability for petitions to the King sheds little, if any, light on the questions before the Court; it addresses the question of legislative immunity. Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 Colum. L.J. 131, 132-138 (1910) (hereinafter *Veeder*). Indeed, although asserted early, it was often denied, both in fact and as a right. *Id.*; *see, e.g.*, *id.* at 132-33 (denials by the Tudor and Stuart kings: in the 16th century by Elizabeth I, in the 17th century by James I). Legislative privilege came to America not in the Petition Clause, as McDonald urges, but in the Speech and Debate Clause: "[F]or any speech or debate in either House they shall not be questioned in any other place." U.S. Const. art. I, § 6. *See Veeder* at 134-35.

McDondald relies heavily on *Lake v. King*, 1 Saund. 131 (1680), and *Harris v. Huntington*, 2 Tyler 129 (Vt. 1802). Any reliance on *Lake* is misplaced. The petition *Lake* found immune from action for libel was presented to a committee of Parliament as a *judicial* body. *Lake v. King*, 1 Saund. at 132. The immunity found was the judicial immunity of a complaint to a court. *See Veeder* at 138.

Harris v. Huntington, except to the extent it relied upon the Vermont Constitution, was wrongly decided. Huntington had petitioned the Vermont legislature not to reappoint Harris as justice of the peace. The Vermont court examined cases providing judicial immunity, 2 Tyler at 136-37, but then looked to *Lake v. King*, which it considered "more in point." Without addressing the fact that *Lake* was decided upon judicial immunity grounds, the Court found the Vermont legislature analogous to Parliament and the same privilege applicable. *Id.* at 137-143. The Court, however, candidly admitted:

> This declaration of the right, with observations already made, might seem to decide the question litigated; but as the point is new, and has been argued

> with great but not unbecoming zeal on the part of the plaintiff, and appears to be a question of interest to community at large, which it is desirable should be settled on such grounds as may put it forever at rest, it may not be improper to investigate it further.

Id. at 143-44. And, indeed other courts of the period did "investigate it further." Respondent has found none that provides, as a matter of common law or constitutional law, the absolute immunity McDonald seeks.

In 1806, the South Carolina Supreme Court treated petitioning as having a qualified privilege. *Reid v. Delorme*, 2 Brev. 76 (S.C. 1806) (Defendant had probable ground" to believe the contents of his petition). The Supreme Judicial Court of Massachusetts, in dicta, described the qualified immunity for petitioning:

> [A] man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint of libel will not be a libel.

Commonwealth v. Clap, 4 Mass. 163, 169 (1808).

Similarly, in 1809, Chancellor Kent described the holding in *Lake* as relying on the judicial nature of the committee of Parliament and found the absolute privilege provided judicial petitions unavailable to petitions outside the judicial context. *Thorne v. Blanchard*, 5 Johns. 508, 524-25 (N.Y. 1809) (Kent, C.J., dissenting). The majority disagreed with Kent as to the nature of the Council of Appointments to which the petition was sent: Kent believing it not judicial, *id.* at 525; Sen. L'Hommedieu believing it judicial, *id.* at 527; and Sen. Clinton believing it judicial, *id.* at 532. Clearly, McDonald misrepresents the holding of the court when he cites *Thorne* for the proposition that "Kent's position had been rejected

by the New York Court of Errors." Petitioner's Brief at 23. Kent's position was that there was no privilege because the Council was not judicial. L'Hommedieu's position was that the Council was judicial and that malice, of which there was no evidence, could not be presumed. Sen. Clinton agreed that "the case . . . cannot be considered as an ordinary libel, where malice is to be implied from the face of the libel. It was, at all events, incumbent on the prosecutor to prove express libel . . . ." *Id.* at 529. The New York court did not reject Kent's position, nor find any absolute common law privilege.

Similarly, in 1815 the Supreme Court of Pennsylvania had opportunity to consider whether a deposition complaining of a public official and delivered to the governor was privileged in a libel action. *Gray v. Pentland*, 2 Serg. &R. 22 (Pa. 1815). The three justices, in separate opinions, all agreed that, if false and published "without probable cause," the words would be actionable. *Id.* at 25, 33 (Yeates, J.); *id.* at 26, 27 (Brackenridge, J.); *id.* at 30 (Tilghman, C.J.).

As other occasions arose to address the question, it became clear that the law was settled:

> At all events, petitions, applications, memorials or remonstrances addressed to subordinate legislative or other official bodies, and in general, those addressed to all executive or administrative officers whatsoever, are privileged only if made in good faith.

Veeder at 139 (footnotes and case citations omitted). This conclusion is consistent with the holding of *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), upon which the courts below relied.

Justice Black took a position similar to McDonald's, arguing against a criminal prosecution for libel, citing the right of petition as provided by the English Bill of Rights, the Declaration of Rights of the Continental Con-

gress, and the Petition Clause. *Beauharnais v. Illinois*, 343 U.S. 250, 267-68 (1952) (Black, J., dissenting). *Compare id. with* Petitioner's Brief at 14, 16-18. The Court rejected that argument, pointing out that "libel of an individual was a common law crime, and thus a crime in the colonies" and remained a crime. *Id.* at 254-57 & nn. 4, 5 (opinion of the Court).[19]

McDonald's arguments are no more persuasive than Justice Black's. The common law decisions early in the life of the Republic provided redress for those defamed to by knowingly or recklessly false petitions.[20]

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[19] *See Roth v. United States*, 354 U.S. at 483 ("At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.").

[20] McDonald's discussion of binding instructions to representatives, and especially his reference to the "people out-of-doors," Petitioner's Brief at 24-27 & n.44, adds nothing to the discussion of the relative importance of speech and petition. The role of the "people out-of-doors" (extralegal, organized, issue-specific riots) had legitimate underpinnings in eighteenth century political thought—both as a voice of the otherwise unrepresented and as a reaction to circumstances for which institutional channels were inadequate. *See* G. Wood, *The Creation of the American Republic, 1776-1787*, 319-28 (1969) (hereinafter *Creation of the American Republic*); Maier, *Popular Uprisings and Civil Authority in Eighteenth Century America*, in Essays in Politics and Social Development: Colonial American 308 (S. Katz ed. 1971) (reprinted from 1970 Wm. & Mary Quarterly 3 (1970)) (hereinafter *Popular Uprisings*). The development of representative government and the concern for minority rights defeated the legitimacy of such actions. *Popular Uprisings* at 337 ("[T]he assumptions behind the Americans' earlier toleration of the mob were corroded in republican American.").

Similarly, the right to replace representatives at frequent intervals was deemed sufficient to assure that the will of the people would actually be represented; the battle for binding instructions

III. ANY PRIVILEGE AVAILABLE PURSUANT TO THE PETITION CLAUSE IS UNAVAILABLE TO McDONALD BECAUSE HIS LETTERS WERE MISDIRECTED.

McDonald purports to ask this Court to find immune from common law libel actions only "statements [that] 'touched on' and were relevant to how respondent would exercise the governmental power sought by him, and were contained in a private petition to *federal officials who had authority to take responsive actions.*" Petitioner's Brief at 7 (emphasis added; footnote omitted). That request, if granted here, would fall far short of protecting McDonald from answering for his statements, and this case should still proceed to trial. McDonald neither limited his petition to those "who had authority to take responsive actions," nor to "federal officials."

A. The December 1, 1980, McDonald Letter Was Directed to Private Citizen Ronald Reagan.

The first McDonald letter was addressed to "The Honorable Ronald Reagan, President-Elect of the United States" and dated "December 1, 1980." J.A. 8. Whatever the scope of the First Amendment right to petition, it is necessarily limited by its terms to petitioning "the government." U.S. Const. amend. I. Ronald Reagan was not part of "the government" until January 20, 1981. U.S. Const. amend. XX ("The terms of the President and Vice President shall end at noon on the 20th day of January, . . . and the terms of their successors shall then begin."). McDonald's December 1, 1980, statements, therefore, were directed to private citizen Ronald Reagan. They are, therefore, outside the provision of the Petition Clause and the privilege McDonald now claims.

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was lost. *See* 1 Annals of Congress 144 (Aug. 15, 1789); U.S. Const. amend. I; *Creation of the American Republic* at 190-91.

Neither the history of these concepts, nor the concepts themselves, raises the right to petition to a more exalted position than that of free speech.

In fact, Mr. Reagan was not even President-elect at the time of the first letter. The Constitution provides for Congress to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes." U.S. Const. art. II, § 1, cl. 4. Congress, pursuant to that direction, provided that selection of electors take place on Tuesday following the first Monday in November. 3 U.S.C. § 1. In 1980, electors were chosen on November 4. Congress further provided that the votes of the electors be cast on the first Monday after the second Wednesday in December. 3 U.S.C. § 7. In 1980, electors votes were cast on December 15. Congress set the day electors' votes would be counted as January 6. 3 U.S.C. § 15. In early December 1980, private citizen Ronald Reagan had received no electoral vote.[21]

The electoral system was provided by the Framers, but is no more an archaic hold-over of a former time than the provisions of the First Amendment under which McDonald seeks protection. In fact, several relatively recent amendments to the Constitution have touched upon the electoral process, and left unchanged the system of selecting electors who, in turn, select the President.[22]

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[21] Not only was Mr. Reagan not part of the government in early December, 1980, the Constitution recognizes that he might never become President. "If, at the time fixed for the beginning of the term of the President, the President-elect shall have died . . . ." U.S. Const. amend. XX § 3. "[I]f the President-elect shall have failed to qualify. . . ." *Id.*

Neither the Constitution nor federal law requires electors to vote for the candidates of their respective political parties. Failure of electors to cast votes as required by state law would raise as yet unresolved questions of federalism and the relationship of the several states with the national government. Declaring that, as a matter of federal constitutional law, a citizen for whom no elector had yet cast a vote was a "federal official[] who had authority to take responsive action" as president or president-elect would ignore the constitutionally mandated electoral system.

[22] *See* U.S. Const. amend. XX (ratified January 23, 1933) (addressing election and terms of the President); *id.* amend. XXII (ratified February 27, 1951) (addressing terms of office of

Further, the Congress has addressed its constitutional responsibilities not only by the quadrennial counting of electors' votes, but as recently as 1948 has enacted legislation pursuant to the electoral college provisions of the Constitution. 3 U.S.C. §§ 1 *et seq.*

In constitutional terms, Mr. Reagan received the December 1, 1980, letter as a private citizen. The Petition Clause of the First Amendment does not protect letters between private citizens.

B. McDonald's Letter was Directed to Other Private Citizens and to Federal Officials Completely Without Authority to Take Responsive Actions.

McDonald seeks to convince the Court that all the alleged recipients of the two McDonald letters were "federal officials who had authority to take responsive actions." Petitioner's Brief at 7. McDonald, however, admits proper allegation of publication, not only to Ronald Reagan when he was a private citizen, but to others who were not, at the time, federal officials and to federal officials who were entirely unrelated to the appointment process.

The staff of Representative W. E. Johnson is alleged to have received the December 1 letter. J.A. 4. Mr. Johnson, however, was not a United States Representative in December 1980. McDonald attempts to avoid that failing of his argument by reference to Mr. Johnson's position on a U.S. attorney candidate "screening committee." Petitioner's Brief at 2. Such a "committee" might have some political status; it has no governmental status. Any attempt to elevate it to a governmental status must fail with regard, at least, to the December 1 letter, be-

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the President); *id.* amend. XXIII (ratified March 29, 1961) (providing Presidential electors for the District of Columbia); *id.* amend. XXIV (ratified January 23, 1964) (excluding poll tax requirements in federal election, including for "electors for President").

cause the "committee's" only function was to advise private citizen Reagan.

Edwin Meese is alleged to have received the December 1 letter. J.A. 4. McDonald's claim of official status for Mr. Meese, as to that letter, rests upon his position as chairman of the transition team. Petitioner's Brief at 2 n.3. That status is dependent upon the status of Mr. Reagan, whose transition to the Presidency it was intended to serve. As Mr. Reagan was a private citizen, not yet President-elect, Mr. Meese was a political, not governmental, figure.

The three United States Representatives who are alleged to have received McDonald's letters, Johnson,[23] Kemp, and Goldwater, J.A. 4-5, had no government function related to the appointment of United States attorneys. *See* Petitioner's Brief at 2 n.3 (claiming no such function for Goldwater and Kemp). Only Senator Helms consistently meets the "arguably in a position to take responsive action" test McDonald sets for himself. *See id.* at 7 n.7. As a Senator, Helms, unlike the Representatives, was required to participate in confirmation of United States attorneys. U.S. Const. art. II, § 2; 26 U.S.C. § 541.

C. McDonald Does Not Claim, and This Court Should Not Grant, Any Petition Clause Immunity for Statements Made to Persons Who Were Not Federal Officials With Authority to Take Responsive Action.

McDonald does not seek immunity for communications "to officials who are not even arguably in a position to take responsive action." Petitioner's Brief at 7 n.7. As he is alleged to have published libel to such persons, the immunity he claims would not immunize his letters.

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[23] Johnson received the December letter as a private citizen and the February letter as a congressman.

The qualified immunity actually available for petitions is limited to petitions to officials "having authority to act." 50 Am. Jur. 2d, *Libel and Slander* § 217.[24] *See* Eldredge, The Law of Defamation 499 (1978); Restatement (Second) of Torts § 598 comments d, e. *See also Webb v. Fury*, 282 S.E.2d at 39; *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1344 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978).

As the applicability of *any* privilege is so limited and McDonald seeks no broader application of the novel privilege he claims; no privilege associated with petitioning protects McDonald's letters.

IV. NO INTEREST PECULIAR TO THE PETITION CLAUSE REQUIRES ANY PROTECTION FOR PREVAILING DEFENDANTS GREATER THAN THOSE PROTECTIONS NOW AFFORDED SPEECH.

After listing substantial, broad protections available under the Speech Clause of the First Amendment, McDonald seeks a constitutional basis for allowing attorney's fees to prevailing defendants and a constitutional preclusion of punitive damages. Petitioner's Brief 37-38.

McDonald thereby asks this Court to provide greater protection for secret statements intended to marshall political clout to ruin an individual, without providing opportunity for response or debate, than the Constitution provides for the open, robust exchange of ideas and information. Petitioner's Brief § IV.[25] Interestingly, however, McDonald supports his request only with arguments that apply equally, or more convincingly, to speech other than petitions.

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[24] "[A]ccording to some authorities, [the privilege applies to petitions addressed] to one who the petitioner reasonably believed was entitled to act. . . ." 50 Am. Jur. 2d, *Libel & Slander* § 217.

[25] McDonald's argument denies the unified approach this Court has taken to First Amendment rights. *See supra* sec. IC.

Although attorney's fees are not generally available to prevailing defendants under the "American Rule," exceptions exist. In addition to statutory provisions for attorney's fee awards, this Court has recognized that such fees may be awarded against a party who litigates "in bad faith, vexatiously, wantonly or for oppressive reasons. . . ." *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258 (1975). Apparently what McDonald seeks is a constitutional basis for attorney's fees in cases brought and pursued properly and in good faith.

Allowing attorney's fee awards in favor of prevailing defendants and against good faith plaintiffs, like the exclusion of punitive damages, would subvert the goals of the First Amendment. Citizens, whether their motives were praiseworthy or malevolent, would eschew open, public discussion of their grievances against the government. Instead, McDonald's view of the Constitution would encourage citizens to seek the safe refuge of a secret petition. Their targets, and those who disagree, would be foreclosed from directly addressing the secret petition, and the government would have the benefit of only one view of the question.

Petitions to courts are public and provide opportunity for response. Petitions to legislators are typically public, and any resulting action of legislators is public. There is opportunity for opposing legislators to respond and oppose action. Petitions to administrators and administrative agencies pursuant to statute or regulation provide for response. *See, e.g., Webb v. Fury*, 282 S.E.2d at 39; *Stern v. United States Gypsum, Inc.*, 547 F.2d at 1344. One defamed by a secret petition, however, has no opportunity to respond to the libel, no opportunity to clear his name, no opportunity to persuade the government that charges are false.

Providing the "protections" McDonald seeks would drive debate on public issues out of the open, into the darkness of the secret petition. The speaker would be safer, but the intended safeguards in the First Amendment would be subverted and the republic would be on more dangerous ground by far.

Additionally, the questions of attorney's fees and punitive damages are not properly before this Court. First, neither was raised before the District Court in Defendant's Motion for Judgment on the Pleadings (July 8, 1982). *See* Defendant's Memorandum in Support of Motion for Judgment on the Pleadings (July 8, 1982).[26] This case is an appeal of the denial of that Motion. Second, neither party has standing to argue these issues. McDonald has not prevailed and been denied attorney's fees, nor has he lost and been subjected to a punitive damages award. These issues should await trial on the merits. *See* U.S. Const. art. III.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

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[26] Neither Court below addressed these questions. *See* Petition for Certiorari, App. A & B.